Supreme Court
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No. 95- 95-701 OCT 17 1995

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

ALAN WEIL, Executive Director, Colorado Department of Health Care Policy and Financing, in his official capacity,
Petitioner,
vs.
WARREN M. HERN; GRAND JUNCTION WOMEN'S CLINIC; PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS; and MAYFAIR WOMEN'S CENTER,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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QUESTION PRESENTED FOR REVIEW

Whether a State participating in Medicaid must pay for every abortion for which federal matching funds are available, contrary to that State's constitution.

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No. 95-

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

ALAN WEIL, Executive Director, Colorado Department of Health Care Policy and Financing, in his official capacity,
Petitioner,
vs.
WARREN M. HERN; GRAND JUNCTION WOMEN'S CLINIC; PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS; and MAYFAIR WOMEN'S CENTER,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

The Executive Director of the Colorado Department of Health Care Policy and Financing petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.[1]

[1] This action was originally filed against Karen Beye, Executive Director of the Colorado Department of Social Services, the state agency formerly responsible for administering the Colorado Medicaid program. After this action was filed, the Colorado General Assembly reorganized three cabinet departments, including the Department of Social Services. The Colorado Department of Health Care Policy and Financing is now responsible for administering the Colorado Medicaid program. *See* 1993 Colo. Sess. L. ch. 230. *Cf.* Rule 35, Rules of the Supreme Court of the United States (Oct. 2, 1995).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App. B) is reported at 57 F.3d 906. The opinion of the United States District Court for the District of Colorado (Pet. App. C) has not been published.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1) (1988). The opinion of the United State Court of Appeals for the Tenth Circuit was delivered on June 8, 1995, and a timely petition for rehearing was denied on July 19, 1995. Pet. App. A.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Article V, section 50 of the Colorado Constitution provides in relevant part:

> No public funds shall be used by the State of Colorado, its agencies or political subdivisions to pay or otherwise reimburse, either directly or indirectly, any person, agency or facility for the performance of any induced abortion, *provided however*, that the General Assembly, by specific bill, may authorize and appropriate funds to be used for those medical services necessary to prevent the death of either a pregnant woman or her

> unborn child under circumstances where every reasonable effort is made to preserve the life of each.

Section 509 of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 1994, Pub. L. No. 103-112, 107 Stat. 1082, 1113 (1993), popularly known as the "Hyde Amendment," provides in relevant part:

> None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the Federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest.

42 U.S.C. § 1396a(a)(17)(A) provides in relevant part:

> A State plan for medical assistance must . . . .
>
> (17) [i]nclude reasonable standards . . . for determining . . . the extent of medical assistance which
>
> (A) are consistent with the objectives of this subchapter. . . .

42 C.F.R. § 441.202 provides:

> FFP [Federal Financial Participation] is not available in expenditures for an abortion

unless the conditions specified in §§ 441.203 and 441.206 are met.

42 C.F.R. § 441.203 provides, in relevant part:

> FFP is available in expenditures for an abortion when a physician has found, and certified in writing to the Medicaid agency, that on the basis of his professional judgment, the life of the mother would be endangered if the fetus were carried to term.

42 C.F.R. § 440.230(c) provides in pertinent part:

> The Medicaid agency may not arbitrarily deny or reduce the amount, duration or scope of a required service . . . solely because of the diagnosis, type of illness, or condition.

STATEMENT OF THE CASE

This case involves the state constitutional provision prohibiting the use of state funds to pay for abortion procedures except to save the life of the mother. It arises from a recent change made in directory language Congress has included in human services appropriations bills continuously since 1976.

Since 1984, Colorado's state constitution has prohibited the use of state funds to pay for abortion procedures except to save the life of the mother. At the time it was adopted, this provision paralleled the federal Hyde Amendment, which placed the same prohibition on federal Medicaid funds.

Medicaid. Petitioner is the Executive Director of the agency that administers the Medicaid program in Colorado. "Medicaid" is the popular name of a joint federal and State program to provide medical assistance to the poor, the disabled, and the otherwise needy.

In order to participate in Medicaid, and qualify for matching federal funds, States are required to submit a plan setting forth the terms and conditions of the medical assistance they will provide. State plans must meet the requirements set forth in Title XIX of the Social Security Act, codified at 42 U.S.C. §§ 1396 to 1396v, and in the implementing regulations found at 42 C.F.R. parts 430 to 456. However, the statutory structure of Medicaid does not demand that States adopt nationally uniform programs. Instead, it allows States to participate if their state plans include "reasonable standards . . . for determining . . . the extent of medical assistance which . . . are consistent with the objectives of" Title XIX. Colorado has participated in Medicaid continuously since 1966.

Federal law regarding abortion funding under Medicaid. In 1965, when the Medicaid program began, abortion was illegal in virtually every State. Accordingly, at the time Medicaid was established, no one understood Title XIX to require States to fund abortions of any kind.

After this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), abortion became more widely available. In 1976, Congress enacted the first Hyde Amendment, a rider to an appropriation bill restricting the availability of federal funds to pay for abortions. Congress has enacted some version of the Hyde Amendment each year since 1976. The version adopted from 1982 to 1992 prohibited the use of federal funds for abortions "except where the life of the mother would be endangered if the fetus were carried to

term." *See, e.g.*, Pub. L. No. 101-166, § 204, 103 Stat. 1159, 1177 (1989). In *Harris v. McCrae*, 448 U.S. 297 (1980), this Court held that Title XIX did not require the States participating in Medicaid to pay for any abortions for which federal matching funds were not available. Thus, from 1982 to 1992, federal law did not permit participating States to pay for abortions with federal funds, except those necessary to save the life of the mother.

Colorado law regarding funding for abortions under medicaid. In 1984, the people of Colorado adopted an amendment to the state constitution which prohibits the use of any public funds to pay for abortions except when necessary to protect the life of the mother. Colo. Const. art. V, § 50. *See also Urbish v. Lamm*, 761 P.2d 756 (Colo. 1988). This provision forbids Colorado from contributing any funds towards the cost of any other abortion even if federal Medicaid funds are available to pay for those costs. An attempt to repeal this provision was rejected by Colorado voters in 1988.

Federal regulations regarding medicaid funding for abortions. On the federal level, the Medicaid program is administered by the Department of Health and Human Services (HHS) through its Health Care Financing Administration (HCFA). In 1987, HHS promulgated regulations providing that federal funds are not available to pay for any abortions unless the abortion is necessary to save the life of the mother. 42 C.F.R. §§ 441.200 to .208.

The 1993 Hyde Amendment. In October 1993, Congress enacted a modified Hyde Amendment permitting, but not mandating, the use of federal funds to pay for abortions, not only when necessary to preserve the life of the mother, but also in cases where the abortion terminates a pregnancy resulting from an act of rape or incest. Section

509 of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 1994, Pub. L. No. 103-112, 107 Stat. 1082, 1113. Congress, however, did *not* make any substantive changes to Title XIX.

The federal regulations limiting federal medicaid funds to those abortions where the mother's life is in danger have *not* been repealed or amended, nor has HCFA evinced any intent to do so. Even so, a HCFA official wrote a letter to state Medicaid directors in December 1993, stating her belief that States must now pay for abortions terminating pregnancies resulting from rape or incest.

District Court Proceedings. Respondents perform abortions, and they commenced an action invoking the court's jurisdiction under 28 U.S.C. §§ 1331, 2201, and 2202 in the United States District Court for the District of Colorado claiming the Colorado restriction on abortion funding conflicted with federal law. Approximately six months after the action was filed, the district court received evidence and heard arguments on Respondents' motion for a preliminary injunction. By agreement of the parties, the hearing on the motion was consolidated with the trial on the merits pursuant to Fed. R. Civ. P. 65(a)(2). The district court held that federal law required Colorado to pay for abortions terminating pregnancies resulting from rape or incest as long as it participated in Medicaid, notwithstanding Colo. Const. art. V, § 50. Pet. App. C-1 to C-4.

Court of Appeals Proceedings. Petitioner pursued a timely appeal to the United States Court of Appeals for the Tenth Circuit. The Court of Appeals noted "the only issue here is whether Colorado's [abortion] funding restriction contravenes the requirements of Title XIX and accompanying regulations." 57 F.3d at 909. The Court of Appeals held

the funding restriction contravened federal law for two different reasons.

First, the Court of Appeals held the funding restriction violates 42 C.F.R. § 440.230(d) because it "impermissibly discriminates in its coverage of abortions on the basis of a patient's diagnosis and condition." 57 F.3d at 910. Second, the Court of Appeals held the funding restriction conflicted with 42 U.S.C. § 1396a(a)(17) because it "is inconsistent with the basic objective of Title XIX -- to provide qualified individuals with medically necessary care." 56 F.3d at 910-911.

Therefore, despite the absence of any change in regulations or in substantive law, the Tenth Circuit interpreted Congress' statement about the availability of federal funds as a mandate overriding the Colorado constitutional prohibition on abortion funding.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION CANNOT BE RECONCILED WITH THIS COURT'S DECISIONS IN *PENNHURST STATE SCHOOL AND HOSPITAL v. HALDERMAN* AND *SOUTH DAKOTA v. DOLE* BECAUSE IT CREATES A FEDERAL MANDATE FROM VAGUE AND CONTRADICTORY STATUTES AND REGULATIONS.

The Court of Appeals held that Colorado may not receive matching federal Medicaid funds unless it agrees to pay for abortions in the cases of rape or incest. The Court

of Appeals purported to find this requirement in the murky shadows of the language of Title XIX and its implementing regulations. However, the oblique and obscure language of Title XIX cannot give rise to the requirement that the Court of Appeals has discovered in this case.

As this Court has held:

> [I]f Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation."

South Dakota v. Dole, 483 U.S. 203, 207 (1987) (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981)).

Title XIX and its implementing regulations contain no requirement that States pay for any abortions, much less a requirement that is unambiguous, allowing the States to make an informed choice as to whether or not to participate in medicaid. It is inconsistent with basic notions of federalism for a federal court to nullify a popularly adopted state constitutional provision where the federal requirement, if it exists at all, is hidden in language so unclear and ambiguous that the States have no notice of it.

These concerns have particular force in the instant case. The federal government and the State of Colorado each contribute more than $700 million annually to Colorado's Medicaid program, providing necessary medical services to nearly 300,000 needy persons each year. If the Court of Appeals' ruling stands, it would jeopardize Colorado's continued participation in Medicaid. Thus, for the cost of a very few abortion procedures each year, hundreds of thousands of citizens will suffer the loss of

necessary medical services. Such a result should not be precipitated by an inference made from vague statutory language, equivocal legislative history, and contrary to clear and unmistakable federal regulations.[2]

A. The Court of Appeals held that Colorado's constitutional restriction on abortion funding violated 42 U.S.C. § 1396a(a)(17)(A) and 42 C.F.R. § 440.230(c).[3] Neither of these authorities contain an unambiguous requirement to fund abortions. Each of these authorities will be examined in turn.

The Court of Appeals held the Colorado Constitution violates 42 C.F.R. § 440.230(c). This regulation provides, in pertinent part:

> The Medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service . . . to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition.

This regulation, on its face, does not contain any express requirement that the States pay for any abortions. Instead, the regulation addressed the issue of discrimination against individuals because they have an unpopular or

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[2] These issues sparked similar litigation in at least three other circuit courts. *See Elizabeth Blackwell Health Care for Women v. Knoll*, 61 F.3d 170 (3d Cir. 1995), *reh'g denied by an equally divided court*; *Hope Medical Group for Women v. Edwards*, ___ F.3d ____ (5th Cir. 1995), *reh'g denied*, ___ F.3d ____; and *Little Rock Family Planning Services v. Dalton*, 60 F.3d 497 (8th Cir. 1995), *reh'g denied*, ____ F.3d. ____.

[3] We should note that neither the respondents nor the district court relied on those provisions.

expensive diagnosis. *See, e.g., Weaver v. Reagan*, 886 F.2d 194 (8th Cir. 1989) (State cannot discriminate against patients with AIDS); *Visser v. Taylor*, 756 F. Supp. 501 (D. Kan. 1990) (State cannot discriminate against schizophrenics). Similarly, a State cannot provide eyeglasses to persons with one diagnosis (*e.g.*, cataracts) and deny eyeglasses to persons with a different diagnosis (*e.g.*, refractive problems). *White v. Beal*, 555 F.2d 1146 (3d Cir. 1977).

In this case, Colorado provides abundant medical assistance to pregnant women. It pays for their prescription drugs, prenatal care, and the delivery of their children. Colorado will even pay for an abortion if it is necessary to save the mother's life. Inasmuch as Colorado does not discriminate on the basis of diagnosis, it does not violate this regulation.

Indeed, it is absurd to say the Colorado Constitution is inconsistent with federal regulations regarding abortion funding, when the only regulations specifically dealing with abortion contain the same restriction. 42 C.F.R. §§ 441.202 and 441.203. In effect, the Court of Appeals concluded that Colorado must pay for abortions under federal regulations, even though the only regulations concerning abortion expressly prohibit such payment, and the regulation purportedly creating the requirement does not even mention abortion, rape, incest, or any other topic relevant to the issues in this case. *Dole* and *Pennhurst* flatly forbid a federal mandate based on such contradictory language.

B. The Court of Appeals also held that Colorado's restriction violates 42 U.S.C. § 1396a(a)(17). This provision of Title XIX permits States to include "reasonable standards" in their state plans for determining "the extent of medical assistance . . . which . . . are consistent with the

objectives of this subchapter. . . ."[4] Obviously, this is not a clear and unambiguous congressional mandate that States pay for abortions. Rather, this language is the very model of vague and imprecise requirement. It contains virtually no standards, and invites courts to create a federal common law of health care policy, depending upon their view of what is "reasonable" and what the "objectives" of Title XIX are. Surely, the States are entitled to more notice than the language of this statute.

Even so, Colorado's abortion funding restriction does not violate even this vague requirement. The Court of Appeals correctly observed that the "basic objective" of Title XIX is to "provide qualified individuals with *medically necessary care*." 57 F.3d at 910-911 (emphasis supplied). However, the procedures at issue in this case are not defined by their medical necessity but by whether or not the pregnancy was the result of rape or incest. There may be any number of philosophical or public policy reasons to finance abortions in such cases, but there are no *medical* reasons to do so. Indeed, the Court of Appeals' decision requires Colorado to finance abortions in cases where there are no *medical* complications in the pregnancy at all.

Rape and incest are crimes perpetrated on innocent victims. However, the tragedy of rape and incest is not a disease or medical condition. Failure to pay for abortions

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[4] This language is not only too vague to create a requirement that the federal government can impose on the States, it is also too vague to create a private cause of action enforceable under 42 U.S.C. § 1983. *Suter v. Artist M.*, 503 U.S. 347 (1993). Just like the "reasonable effort" language that this Court found unenforceable in *Suter*, Title XIX's language that standards be "reasonable" and "consistent with the objectives" of Title XIX are unenforceable.

in the case of rape or incest is not a failure to pay for "medically necessary care." Nor is it inconsistent with the objectives of Title XIX, especially where Congress itself, without ever amending Title XIX, refused to pay for these very procedures for ten years, and where Congress has continued to deny funding for the vast majority of abortions.

C. The Court of Appeals further attempted to bolster its holding by reference to statements from various members of Congress during the debate on the 1993 version of the Hyde Amendment. 57 F.3d at 912-913. However, the issue at bar is the meaning of Title XIX, not the meaning of the 1993 version of the Hyde Amendment. The Hyde Amendment only permits the expenditure of federal funds; it does not contain any language that even arguably creates any obligations on the part of the States. The Court of Appeals did *not* hold that the Hyde Amendment created any such obligations and correctly stated, "the only issue here is whether Colorado's funding restriction contravenes the requirements of Title XIX and accompanying regulations." 57 F.3d at 909.[5]

In any event, it is unclear what value the legislative history of the 1993 Hyde Amendment could have. All of the relevant sections of Title XIX were adopted in 1965, and comments by members of Congress nearly 30 years later shed no light on what was intended when Title XIX was passed. *Madison Galleries, Ltd. v. United States*, 870 F.2d 627, 632-33 (Fed. Cir. 1989) ("A law may be amended, superseded or rescinded by another law, but not by subsequent legislative history.") Further, all of the comments cited by the Court of Appeals concern the

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[5] Indeed, as an appropriation measure, the Hyde Amendment could not serve to amend a substantive law such as Title XIX. *Cf. United States v. Will*, 449 U.S. 200 (1980).

anticipated consequences if *no* Hyde Amendment were passed. None of the comments cited addressed the effect of the version of the Hyde Amendment that *was* actually passed; no opinion was offered on whether a state restriction on abortion funding that was similar to, but not identical with, the Hyde Amendment was permissible.[6]

As noted above, Congress can only attach conditions to the receipt of federal funds if it does so unambiguously. *Dole*, 483 U.S. at 207. As this Court has repeatedly said, courts should not resort to legislative history unless the statute is ambiguous. *Ratzlaff v. United States*, __ U.S. __, 114 S. Ct. 655, 662 n.18 (1994). If it is necessary to resort to legislative history, such a condition is inherently ambiguous under *Dole*. To hold otherwise would effectively require participating States to appropriate "a congressionally compelled subsidy" of which they had no notice. *New York v. United States*, 505 U.S. 144, 175 (1992). Such congressionally mandated appropriations "commandeer" the State legislative process, *New York*, 505 U.S. at 161, abridge "the right of the people" of the several States "to pass their

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[6] Even so,

> In construing laws we have been extremely wary of testimony before committee hearings and of debates on the floor of Congress save for precise analyses of statutory phrases by the sponsor of the proposed laws. . . . The reason is the caveat of Mr. Justice Holmes, "We do not inquire what the legislature meant; we ask only what the statute means."

S & E Contractors, Inc. v. United States, 406 U.S. 6, 13 n.9 (1972) (quoting Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419. *See also Conroy v. Aniskoff*, 113 S. Ct. 1562, 1568 n.2 (1993) (Scalia, J., concurring).

own laws," *Baker v. Carr*, 369 U.S. 186, 222 n.48 (1962), and effectively abrogate self-government.[7] *Cf. Rizzo v. Goode*, 423 U.S. 362, 378 (1976) ("[w]here, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own law.").

II. THE COURT OF APPEALS' CONCLUSION THAT STATES MUST FUND ALL ABORTIONS FOR WHICH FEDERAL FUNDS ARE AVAILABLE, IN ORDER TO PARTICIPATE IN MEDICAID, WAS EXPRESSLY RESERVED BY THIS COURT IN *HARRIS v. McCRAE*.

In this case, the Tenth Circuit held that Title XIX requires States to fund all abortions where federal funds are available. This Court expressly reserved judgment on this very issue in *Harris v. McCrae*, 448 U.S. 297 (1980), and this important legal question should be decided by this Court, rather than a lower court.

In *Harris*, the lower court held that Title XIX required States to fund all medically necessary abortions but

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[7] *Cf. Brown v. Environmental Protection Agency*, 521 F.2d 827 (9th Cir. 1975), *vacated and remanded for consideration of mootness*; *Environmental Protection Agency v. Maryland*, 431 U.S. 99 (1977), *on remand*, 566 F.2d 665 (9th Cir. 1977).

that the Hyde Amendment was a substantive amendment to Title XIX.[8]

This Court affirmed the result, "but for somewhat different reasons." 448 U.S. at 308. Indeed, this Court pointedly refused to endorse the theory that the Hyde Amendment was a substantive amendment to Title XIX: "we need not inquire . . . whether the Hyde Amendment is a substantive amendment to Title XIX." 448 U.S. at 310 n.14. Thus, the Tenth Circuit's decision in this case rests on a premise this Court has expressly refused to adopt: that Title XIX requires States to fund abortions.

If Congress may use annual appropriations riders to effectively create substantive mandates affecting Medicaid, States cannot make informed choices about whether to participate in that program. As a result, abortion funding becomes a perpetually unsettled issue. As a result, the litigation of this precise question in at least four Courts of Appeals now makes it appropriate for this Court to resolve the question it explicitly reserved in *Harris v. McCrae*.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted this 17th day of October, 1995.

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[8] "The District Court . . . conclud[ed] that even though Title XIX would otherwise have required a participating State to fund medically necessary abortions, the Hyde Amendment had substantially amended Title XIX to relieve a State of that funding obligation." 448 U.S. at 305.

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

WARREN M. HERN; GRAND JUNCTION WOMEN'S CLINIC; PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS, named: Planned Parenthood of the Rocky Mountains, Inc.; MAYFAIR WOMEN'S CENTER,	)	
Plaintiffs-Appellees,	)	
v.	)	No. 94-1205
KAREN BEYE, Executive Director, State Department of Social Services, in her official capacity,	)	
Defendant-Appellant.	)	
- - - - - - - - -	)	
COLRADO STATE LEGISLATURE,	)	
Amicus Curiae.	)	

ORDER
Entered July 19, 1995

Before MOORE, ANDERSON, and TACHA, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER, Clerk

By:
/s/
Deputy Clerk

APPENDIX B

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

WARREN M. HERN; GRAND JUNCTION WOMEN'S CLINIC; PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS, named: Planned Parenthood of the Rocky Mountains, Inc.; MAYFAIR WOMEN'S CENTER, Plaintiffs-Appellees, v. KAREN BEYE, Executive Director, State Department of Social Services, in her official capacity, Defendant-Appellant, - - - - - - - - - - - - - - COLORADO STATE LEGISLATURE, Amicus Curiae.	No. 94-1205

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. No. 93-N-2350)

Before **MOORE, ANDERSON,** and **TACHA,** Circuit Judges.

TACHA, Circuit Judge.

Plaintiffs are a physician and three women's health care facilities that provide abortion services to women in Colorado. They brought this action pursuant to 28 U.S.C. §§ 2201 and 2202 seeking to enjoin defendant Karen Beye, the executive director of Colorado's Department of Social Services, from enforcing Colo. Const. art. V, § 50, Colo. Rev. Stat. §§ 26-4-105.5, 26-4-512, and 26-15-104.5, and 10 Colo. Code Regs. § 2505-10 (8.733). These provisions forbid the Colorado state government, its agents, or its political subdivisions from funding abortions except to save the life of an expectant mother. The United States District Court for the District of Colorado held that a state that participates in the Medicaid program must fund abortions for Medicaid-eligible women to terminate pregnancies resulting from rape or incest. Accordingly, it granted plaintiffs an injunction prohibiting defendant from enforcing any of these provisions to the extent that they conflict with federal Medicaid law so long as Colorado continues to participate in Medicaid. We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1292(a)(1), and we affirm.

I

By initiative, the voters of Colorado amended the state's constitution in 1984 to add the following section:

> No public funds shall be used by the State of Colorado, its agencies or political subdivisions to pay or otherwise reimburse, either directly or indirectly, any person, agency or facility

> for the performance of any induced abortion, PROVIDED HOWEVER, that the General Assembly, by specific bill, may authorize and appropriate funds to be used for those medical services necessary to prevent the death of either a pregnant woman or her unborn child under circumstances where every reasonable effort is made to preserve the life of each.

Colo. Const. art. V, § 50. Colorado has incorporated the mandate of section 50 into its statutes, Colo. Rev. Stat. §§ 26-4-105.5, 26-4-512, 26-15-104.5, and its code of regulations, 10 Colo. Code Regs. § 2505-10 (8.733).

In 1976, eleven years after the creation of the Medicaid program, Congress passed the Hyde Amendment, a rider attached to the appropriations bill for the Departments of Labor and Health, Education and Welfare (HEW).[1] Congress has subsequently altered the Hyde Amendment several times. The version in force from 1981 until 1993 prohibited the use of federal funds for abortions "except where the life of the mother would be endangered if the fetus were carried to term." *See, e.g.*, Pub. L. No. 101-166, § 204, 103 Stat. 1159, 1177 (1989).

On October 22, 1993, President Clinton signed into law the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-112, 107 Stat. 1082 (1993). The Act contained a new version of the Hyde Amendment that expanded the category of abortions for which federal funds are available under Medicaid. *Id.* § 509, 107 Stat. at 1113

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[1] HEW has subsequently been divided into two separate executive departments: the Department of Education and the Department of Health and Human Services (HHS).

(the 1994 Hyde Amendment). The language now in force states:

> None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the Federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest.

Id.

On November 8, 1993, plaintiffs brought this action seeking injunctive relief. They claimed that, because Colorado's funding restriction denies coverage for abortions for which federal funds are available under the 1994 Hyde Amendment -- namely, abortions to terminate pregnancies resulting from rape or incest -- Colorado's Medicaid program violates mandatory federal requirements. Defendant contended that participating states are not required to fund all abortions for which federal funds are available. Rather, she argued, the language of the Hyde Amendment is purely permissive, and the underlying federal statute and regulations leave the decision of whether to finance such services to the discretion of participating states. The district court granted plaintiffs injunctive relief, enjoining defendant from enforcing Colorado's abortion funding restriction to the extent that it conflicts with federal law.[2] Defendant now appeals.

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[2] After issuing its ruling from the bench May 5, 1994, the court issued a written order a week later that further explained its decision. *Hern v. Beye*, No. CIV-A-93 N 2350, 1994 WL 192366 (D. Colo. May 12, 1994). The two orders, when read together, are somewhat unclear as to the scope of the injunction granted.

II

Title XIX of the Social Security Act of 1965, 42 U.S.C. §§ 1396-1396v, establishes Medicaid, a jointly funded federal-state program designed to finance medical care for indigent Americans. Its stated purpose is to "enabl[e] each State, as far as practicable under the conditions in such State, to furnish . . . medical assistance [to those persons] whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. § 1396. Each state's participation in Medicaid is purely optional. *Harris v. McRae*, 448 U.S. 297, 301 (1980). But "[o]nce a State voluntarily chooses to participate in Medicaid, the State must comply with the requirements of Title XIX and applicable regulations." *Alexander v. Choate*, 469 U.S. 287, 289 n.1 (1985). Colorado participates in Medicaid through the Colorado Medical Assistance Act, Colo. Rev. Stat. §§ 26-4-101 to -704.

The Hyde Amendment circumscribes participating states' obligations to fund abortions under Medicaid. On its face, the Hyde Amendment appears to be only an appropriations measure; it merely prohibits the use of federal funds for certain services. But in *Harris v. McRae*, 448

Nevertheless, the written order of May 12 evinces the district court's intention to enjoin defendant from enforcing Colorado's abortion funding restriction only "insofar as those statutes or rules are more restrictive" than federal requirements. *Id.* at *2; *see also id.* at *1 (noting that nothing in the injunction "mandates that [defendant] go beyond federal requirements"). We therefore understand the court's injunction as prohibiting defendant -- so long as Colorado continues to accept federal Medicaid funds -- from enforcing the abortion funding restriction in a manner that conflicts with federal Medicaid law.

U.S. 297, the Supreme Court construed the Hyde Amendment as indirectly modifying states' obligations under Title XIX. The plaintiffs in *McRae* contended that, despite the Hyde Amendment, Title XIX required states to fund *all* medically necessary abortions, including those for which federal funds were unavailable. *See, id.* at 304-05. The Court, however, reasoned that "Title XIX was designed as a cooperative program of shared financial responsibility, not as a device for the Federal Government to compel a State to provide services that Congress itself is unwilling to fund." *Id.* at 309. As a result,

> by the normal operation of Title XIX, even if a State were otherwise required to include medically necessary abortions in its Medicaid plan, the withdrawal of federal funding under the Hyde Amendment would operate to relieve the State of that obligation for those abortions for which federal reimbursement is unavailable.

Id. at 310.

Thus, the Hyde Amendment -- by denying federal funds for certain abortions -- operates as an overlying exception to the requirements of Title XIX and accompanying regulations, carving out particular services that states are not obligated to cover. Under the 1994 Hyde Amendment, states are not required to fund abortions when the pregnancy is not the result of rape or incest and the expectant mother's life is not at stake.

Importantly, however, the Hyde Amendment does *not* affect states' underlying obligations imposed by Title XIX and federal Medicaid regulations. That is, although the Hyde Amendment relieves states of having to fund abortions

for which federal funding is unavailable, it does not alter states' obligations with respect to abortions for which federal funding *is* available. Because the 1994 Hyde Amendment permits federal funding for abortions to end pregnancies resulting from rape or incest, the only issue here is whether Colorado's funding restriction contravenes the requirements of Title XIX and accompanying regulations.

III

Title XIX requires participating states to provide medical assistance to the "categorically needy" -- individuals who qualify for Medicaid because they receive some form of federal cash assistance (*e.g.*, Aid to Families with Dependent Children or Supplemental Security Income). 42 U.S.C. § 1396a(10)(A)(i); 42 C.F.R. § 436.100-.128. States may also, at their option, cover "medically needy" individuals -- persons who do not qualify as categorically needy but nevertheless cannot afford adequate medical care. 42 U.S.C. § 1396a(10)(A)(ii); 42 C.F.R. § 436.300-.330.

While states have considerable flexibility in determining the scope of their Medicaid coverage, *see* 42 C.F.R. § 430.0; *Beal v. Doe*, 432 U.S. 438, 444 (1977), Title XIX requires states to cover at least seven general categories of medical services for categorically needy individuals, 42 U.S.C. § 1396a(a); *id.* § 1396d(a)(1)-(5), (17), (21); 42 C.F.R. § 440.210. Abortion falls under several of these "mandatory coverage" categories, including "inpatient hospital services," 42 U.S.C. § 1396d(a)(1), "outpatient hospital services," *id.* § 1396d(a)(2)(A), "family planning services," *id.* § 1396d(a)(4)(C), and "physicians' services furnished by a physician," *id.* § 1396d(a)(5)(A).

Participating states are not required, however, to fund *all* medical services falling under one of the mandatory coverage categories. *Beal*, 432 U.S. at 441. Rather, Title XIX "confers broad discretion on the States to adopt standards for determining the extent of medical assistance" offered in their Medicaid programs. *Id.* at 444. In addition, federal Medicaid regulations expressly permit participating states to "place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures." 42 C.F.R. § 440.230(d).

Nonetheless, there are important restrictions on states in their exercise of this discretion. Two of those restrictions are particularly relevant here. First, Title XIX requires participating states to establish "reasonable standards . . . for determining . . . the extent of medical assistance under [their Medicaid] plan which . . . are consistent with the objectives of [Title XIX]." 42 U.S.C. § 1396a(a)(17). Second, state Medicaid plans "may not arbitrarily deny or reduce the amount, duration, or scope of [such] service[s] . . . to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition." 42 C.F.R. § 440.230(c).

IV

Colorado's restriction on abortion funding is essentially a limit based on the patient's degree of medical necessity pursuant to 42 C.F.R § 440.230(d): It restricts Medicaid funding for abortions to those instances when the expectant mother's life is at stake. We conclude that this restriction violates the requirements of federal law -- requirements that Colorado is compelled to follow as a condition of its participation in Medicaid.

First, Colorado's Medicaid program as amended by the abortion funding restriction impermissibly discriminates in its coverage of abortions on the basis of a patient's diagnosis and condition. While 42 C.F.R. § 440.230(c) allows states to use medical need as a criterion for placing appropriate limits on coverage, a state may not single out a particular, medically necessary service and restrict coverage to those instances where the patient's life is at risk. *Preterm, Inc. v. Dukakis*, 591 F.2d 121, 126 (1st Cir.), *cert. denied*, 441 U.S. 952 (1979). Such a "policy denies service solely on the basis of diagnosis or condition, and does so arbitrarily because the denial is not in accordance with a uniform standard of medical need." *Hodgson v. Board of County Comm'rs*, 614 F.2d 601, 608 (8th Cir. 1980) (footnotes omitted). Indeed, "[w]hen a state single outs one particular medical condition . . . and restricts treatment for that condition to life and death situations it has . . . crossed the line between permissible discrimination based on degree of need and entered into forbidden discrimination based on medical condition." *Preterm*, 591 F.2d at 126; *see also Zbaraz v. Quern*, 596 F.2d 196, 199 (7th Cir. 1979) ("We agree with the conclusion of the court in *Preterm* that limiting Medicaid assistance to life-threatening abortions 'violate[s] the purposes of the Act and discriminate[s] in a proscribed fashion.'") (*quoting Preterm*, 591 F.2d at 126), *cert. denied*, 448 U.S. 907 (1980).

Second, Colorado's restriction violates 42 U.S.C. § 1396a(a)(17) because it is inconsistent with the basic objective of Title XIX -- to provide qualified individuals with medically necessary care. The purpose of Medicaid as stated in the Act is to enable states to provide medical treatment to needy persons "whose income and resources are insufficient to meet the cost of *necessary medical services*." *Id.* § 1396 (emphasis added). This circuit, as well as several other courts, has interpreted Title XIX and its accompanying

regulations as imposing a general obligation on states to fund those mandatory coverage services that are medically necessary. *See, e.g., Doe v. Rose*, 499 F.2d 1112, 1114 (10th Cir. 1974) ("The import . . . of [Medicaid's] statutory scheme is that indigents who qualify for Medicaid benefits are to receive all necessary medical and hospital care."); *Weaver v. Reagan*, 886 F.2d 194, 198 (8th Cir. 1989) (holding that Title XIX "require[s] that a state Medicaid plan provide treatment that is deemed 'medically necessary' in order to comport with the objectives of the Act"); *Pinneke v. Preisser*, 623 F.2d 546, 549 (8th Cir. 1980) ("Title XIX . . . mandates that [seven] basic categories of medical assistance be provided to all categotically needy persons when the assistance is medically necessary."); *cf. Beal*, 432 U.S. at 444 (stating that "serious statutory questions might be presented if a state Medicaid plan excluded necessary medical treatment from its coverage").[3]

It may be that, pursuant to a generally applicable funding restriction or utilization control procedure, a

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[3] *See also Little Rock Family Planning Servs. v. Dalton*, 860 F. Supp. 609, 616 (E.D. Ark. 1994) ("What Title XIX does is to specify the categories of care . . . that every state Medicaid program must cover when 'medically necessary.'"); *Visser v. Taylor*, 756 F. Supp. 501, 507 (D. Kan. 1990) (holding that the "touchstone" of cases interpreting Title XIX's requirements for coverage "is medical necessity"); *Allen v. Mansour*, 681 F. Supp. 1232, 1237 (E.D. Mich. 1986) ("[T]he medical necessity of the procedure is the touchstone for evaluating the reasonableness of standards in state medicaid plans."); *Montoya v. Johnston*, 654 F. Supp. 511, 513 (W.D. Tex. 1987) (holding that "it would be inconsistent with the objectives of the [Medicaid] Act" for a state to deny funding for "medically necessary treatment"); *Simpson v. Wilson*, 480 F. Supp. 97, 101 (D. Vt. 1979) ("The federal regulations do not permit [a state] to decline to provide medically necessary services.").

participating state could deny coverage for a service deemed medically necessary in a particular case. *See, e.g., Miller v. Whitburn*, 10 F.3d 1315, 1321 (7th Circuit 1993) (stating that a participating state may deny coverage for experimental treatments so long as its definition of "experimental" and its application of the restriction are reasonable); *Charleston Memorial Hosp. v. Conrad*, 693 F.2d 324, 330 (4th Cir. 1982) (holding that a state's annual limits on Medicaid coverage to twelve inpatient hospital days -- which met the needs of 88 percent of Medicaid recipients -- and eighteen outpatient hospital visits -- which met the needs of 99 percent of Medicaid recipients -- was consistent with Title XIX and applicable regulations); *Curtis v. Taylor*, 625 F.2d 645, 651-53 (5th Cir. 1980) (upholding a state's limit on Medicaid coverage to three physicians' visits per month where only 3.9 percent of the state's Medicaid population had required more than three physicians' visits in any one month in the year before the regulation was adopted).[4] But a state law that categorically denies coverage for a specific, medically necessary procedure except in those rare instances when the patient's life is at stake is not a "reasonable standard[] . . . consistent with the objectives of [the Act]," 42 U.S.C. § 1396a(a)(17), but instead contravenes the purposes of Title XIX. *Accord Hodgson*, 614 F.2d at 611; *Zbaraz*, 596 F.2d at 199; *Preterm*, 591 F.2d at 126; *cf. Pinneke*, 623 F.2d at 549 (holding that a state policy creating an irrebuttable presumption that a particular procedure "can never be medically necessary" under certain circumstances

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[4] Importantly, the court in *Curtis* noted that the coverage restriction at issue in that case was "completely unlike state limitations on treatment for abortions to life and death situations. Such limitations single out pregnancy and establish a unique standard governing the provision of necessary medical services for that condition." *Curtis*, 625 F.2d at 652.

was "not consistent with the objectives of the Medicaid statute").

We note that the four other circuit courts to confront similar state restrictions on abortion funding under Medicaid have all concluded that such limitations violate the requirements of federal Medicaid law. *See Edwards v. Hope Medical Group for Women*, 115 S. Ct. 1, 2 (1994) (Scalia, Circuit Justice) (*citing Roe v. Casey*, 623 F.2d 829, 831, 834 (3d Cir. 1980), *Hodgson*, 614 F.2d at 611, *Zbaraz*, 596 F.2d at 199, and *Preterm*, 591 F.2d at 126-27). Two of those courts expressly held that states participating in Medicaid must subsidize all abortions for which federal funds are available. *See Casey*, 623 F.2d at 836 ("Title XIX, as . . . modified [by the Hyde Amendment], requires the states to fund abortions in two categories: where the mother is endangered and where the pregnancy was the result of rape or incest."; *Zbaraz*, 596 F.2d at 199 n.7 (stating that the Hyde Amendment "clearly mandates" that participating states subsidize those abortions for which federal funding is available). The two other courts held that a state's restriction of abortion coverage to those cases where the woman's life is at stake -- when the Hyde Amendment makes federal funding available for a broader class of abortions -- violates the requirements of Title XIX. *See Hodgson*, 614 F.2d at 611 ("Minnesota's welfare scheme, which subsidizes medical assistance services generally but which subjects abortions to a 'life-threatening' standard, is inconsistent with and superseded by Title XIX."); *Preterm*, 591 F.2d at 126 ("We find it 'unreasonable' and wholly' [in]consistent with the objectives of the Act', 42 U.S.C. § 1396a(a)(17), for a state to provide abortion services and then . . . deny it to all those who will not die without it.").

We are also bolstered in our reasoning by several recent district court decisions. Indeed, every federal district court

to consider this precise question since Congress enacted the 1994 Hyde Amendment has concluded that participating states must fund abortions to end pregnancies resulting from rape or incest. *See Fargo Women's Health Org., Inc. v. Wessman*, Civ. No. A3-94-36, slip op. at 25 (D.N.D. Mar. 15, 1995); *Orr v. Nelson*, 874 F. Supp. 998, 1003 (D. Neb. 1995); *Stragler v. Shalala*, No. 94-4221-CV-C-5, 1994 WL 764104 at *5 (W.D. Mo. Dec. 28, 1994); *Planned Parenthood v. Wright*, No. 94 C 6886, 1994 WL 750638, at *2 (N.D. Ill. Dec. 6, 1994); *Elizabeth Blackwell Health Center for Women v. Knoll*, No. 94-CV-0169, 1994 WL 512365, at *1 (E.D. Pa. Sep. 15, 1994); *Hope Med. Group for Women v. Edwards*, 860 F. Supp. 1149, 1154 (E.D. La. 1994); *Little Rock Family Planning Servs. v. Dalton*, 860 F. Supp. 609, 622 (E.D. Ark. 1994); *Planned Parenthood Affiliates v. Engler*, 860 F. Supp. 406, 409-10 (W.D. Mich. 1994); *Planned Parenthood v. Blouke*, 858 F. Supp. 137, 141 (D. Mont. 1994).

Finally, our interpretation of Title XIX and the Medicaid regulations plainly comports with Congress' understanding of the effect of passing the 1994 Hyde Amendment. The floor debates in the Senate and the House of Representatives reveal Congress's understanding that participating states must fund those abortions for which federal funds are available. For instance, Senator Hatch stated that if the Hyde Amendment were repealed, "every State will be required to provide matching funds for abortion on demand." 139 Cong. Rec. S12,581 (daily ed. Sept. 28, 1993). Senator Nickles likewise stated that "removal of the Hyde language would result in mandating that the States pay for these abortions with State dollars. . . . This is not a State opt out. There are no state options. States have to match

the Federal funds." *Id.* at S12,588.[5] In the House, Representative Dornan stated that unless HHS

> designates abortions as an optional procedure, or treats abortion differently from all other Medicaid services by paying for them entirely with Federal funds -- rather than requiring a state match -- [repealing the Hyde Amendment would mean that] States would be required to participate in providing abortions on demand, or lose Federal Medicaid reimbursement.

139 Cong. Rec. H4325 (daily ed. June 30, 1993). And Representative Waxman stated that eliminating the Hyde Amendment would mean that "medically necessary abortions would be required to be performed by the States." *Id.* at H4323.

We acknowledge that Colorado "has legitimate interests from the outset of the pregnancy in protecting . . . the life of the fetus that may become a child." *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2804 (1992); *see also Roe v. Wade*, 410 U.S. 113, 162 (1973) (recognizing a state's "important and legitimate interest in . . . protecting the potentiality of human life" in a fetus). We also recognize

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[5] Other senators stated that repealing the Hyde Amendment would "mandate[] taxpayer-funded abortion on demand for Medicaid-eligible women," 139 Cong. Rec. S12,577 (daily ed. Sept. 28, 1993) (statement of Senator Smith), "allow all women in this Nation, regardless of income or status, the ability to exercise their constitutional right to choose," *id.* at S12,575 (statement of Senator Murray), and mean that "Government will get out of the business of intruding into the lives, private lives, of women and let a woman make the decision for herself," *id.* at S12,582 (statement of Senator Mikulski).

that Colorado "has a valid and important interest in encouraging childbirth." *Beal*, 432 U.S. at 445. If Colorado chose not to participate in Medicaid, it would not be required to fund any abortions whatsoever. *Maher v. Roe*, 432 U.S. 464, 469 (1977). But because Colorado has decided to participate and accept federal Medicaid funds, it must do so on the terms established by Congress. So long as Colorado continues to participate in Medicaid, it cannot deny Medicaid funding for abortions to qualified women who are the victims of rape or incest.

V

In sum, we find that Colorado's abortion funding restriction, as stated in Colo. Const. art. V, § 50, Colo. Rev. Stat. §§ 26-4-105.5, 26-4-512, 26-15-104.5, and 10 Colo. Code Regs. § 2505-10 (8.733), violates federal Medicaid law insofar as it denies funding to Medicaid-eligible women seeking abortions to end pregnancies that are the result of rape or incest. So long as Colorado continues to participate in Medicaid, defendant is enjoined from denying Medicaid funding for abortions to qualified women whose pregnancies are the result of rape or incest.[6] Accordingly, we **AFFIRM** the district court's order granting plaintiffs final injunctive relief.

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[6] Again, we understand the district court's injunction as enjoining defendant form enforcing Colorado's abortion funding restriction only to the extent that it conflicts with federal Medicaid law. *See* note 2 *supra*. It is on this basis that we affirm the district court's order.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 93 N 2350

WARREN M. HERN, M.D., GRAND JUNCTION WOMEN'S CLINIC, PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS, INC., and MAYFAIR WOMEN'S CENTER,

Plaintiffs,

v.

KAREN BEYE, Executive Director State Department of Social Services, in her official capacity,

Defendant.

ORDER GRANTING FINAL INJUNCTIVE RELIEF

On May 5, 1994, I held a hearing on plaintiffs' request for a preliminary injunction. With the parties' consent, I consolidated that hearing with a hearing on the merits, pursuant to rule 65(a) of the Federal Rules of Civil Procedure. After taking testimony, hearing argument, and reviewing the pleadings submitted in this case, I stated certain findings and conclusions, ruled on pending motions, and orally granted injunctive relief.

The injunctive relief granted was a modified form of the relief requested by plaintiffs. I stated that Colorado

must administer its Medicaid plan in accordance with the requirements of federal law - specifically Title XIX of the Social Security Act, commonly known as the "Medicaid Act," 42 U.S.C.A. §§ 1396-1396v (West 1992 & Supp. 1994) - *so long as Colorado continues to receive federal monies pursuant to the Medicaid Act.* I refused to re-draft Article V, Section 50 of the Colorado Constitution. *See, e.g., Roe v. Casey*, 623 F.2d 829, 836-37 (3d Cir. 1980). Since that constitutional provision is inconsistent with federal law, I enjoined defendant from enforcing it, so long as the State of Colorado accepts federal money pursuant to the Medicaid Act.

I also enjoined defendant from enforcing certain Colorado statutes and regulations which purport to implement Article V, Section 50, insofar as those state statutes and regulations are inconsistent with the Medicaid Act and implementing federal regulations. Although neither side cited Colo. Rev. Stat. § 26-4-105 (1989) in briefs, motions, or pleadings, it appears to me that this statute accomplishes the same end as the court's oral injunction. It provides:

> Nothing in this article [The Colorado Medical Assistance Act] shall prevent the state department from complying with federal requirements for a program of medical assistance in order for the state of Colorado to qualify for federal funds under Title XIX of the social security act and to maintain a program within the limits of available appropriations.

Id. Although I think this statute could not override the state constitutional provision, it does appear to clarify defendant's authority once enforcement of the

constitutional provision is enjoined: she is to administer the Colorado Medical Assistance Act in compliance with federal requirements for a program of medical assistance. Moreover, there is nothing in my injunction which mandates that she go *beyond* federal requirements. *See Harris v. McRae*, 488 U.S. 297, 310 & n.15, 100 S. Ct. 2671, 2684 & n.15 (1980) ("Thus, by the normal operation of Title XIX, even if a State were otherwise required to include medically necessary abortions in its Medicaid plan, the withdrawal of federal funding under the Hyde Amendment would operate to *relieve* the State of that obligation for those abortions for which federal reimbursement is unavailable." [emphasis added]). The issue was not presented, and I did not decide what (if any) additional requirements are imposed by state law.

Based on the findings and conclusions stated in open court on May 5, 1994, and upon Colo. Rev. Stat. § 26-4-105, it is

ORDERED as follows:

(1) Plaintiffs' request for a preliminary injunction is DENIED.

(2) Defendant's motion to dismiss is DENIED.

(3) Plaintiffs' motion for summary judgment is GRANTED, in part.

Defendant is enjoined, so long as the State of Colorado accepts federal funds under the Medicaid Act, from enforcing the provisions of Article V, Section 50 of the Colorado Constitution. Defendant is further enjoined from enforcing Colo. Rev. Stat. §§ 26-4-105.5, 26-4-512, or 26-15-104.5, or any rules and regulations implementing

these statutes, *insofar as those statutes or rules are more restrictive than the terms of the current Hyde Amendment,* Pub. L. No. 103-122, § 510, 107 Stat. 1113 (1993). Defendant is free to follow Colo. Rev. Stat. § 26-4-105 by "complying with federal requirements for a program of medical assistance necessary for the state of Colorado to qualify for federal funds under Title XIX of the social security act," as amended by the current Hyde Amendment.

(4) This injunction shall constitute the final judgment of this court.

(5) Upon a finding that plaintiffs would continue to suffer irreparable injury were the court's injunction stayed pending appeal and that such injury outweighs the harm to defendant which would be occasioned if the stay were denied, defendant's oral motion for a stay of this injunction is DENIED.

Dated this 12 day of May, 1994, *nunc pro tunc* May 5, 1994.

BY THE COURT:

/s/
EDWARD W. NOTTINGHAM
United States District Judge

No. 95-701

Supreme Court, U.S.
FILED
NOV 3 1995
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ALAN WEIL, Executive Director, Colorado Department of Health Care Policy and Financing, in his official capacity,

Petitioner,

—vs.—

WARREN M. HERN, M.D.; GRAND JUNCTION WOMEN'S CLINIC; PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS, INC.; and MAYFAIR WOMEN'S CENTER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, as the six federal courts of appeal to reach this issue have uniformly held, states that participate in the federal Medicaid program must cover all medically necessary abortions for Medicaid-eligible women for which federal funding is not proscribed.

PARTIES TO THE PROCEEDING

Respondents are Warren M. Hern, M.D., Grand Junction Women's Clinic, Planned Parenthood of the Rocky Mountains, Inc. and Mayfair Women's Center, on behalf of themselves and their patients.

Warren M. Hern, M.D. is an individual. Utah Women's Clinic, Inc. is a corporation doing business as Grand Junction Women's Clinic. Planned Parenthood of the Rocky Mountains, Inc. is a corporation with no subsidiary or parent corporations. Mayfair Women's Center is a corporation with no subsidiary or parent corporations.

Petitioner is Alan Weil, Executive Director, Colorado Department of Health Care Policy and Financing. Defendant-appellant below was Karen Beye, Executive Director of the Colorado Department of Social Services.

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Respondents Warren M. Hern, M.D., *et al.* oppose the Petition for Writ of Certiorari, docketed on October 31, 1995, by the Executive Director of the Colorado Department of Health Care Policy and Financing ("petitioner"). Petitioner seeks review of a decision of the United States Court of Appeals for the Tenth Circuit, *Hern v. Beye*, 57 F.3d 906 (10th Cir. 1995), holding that, under the Supremacy Clause of the U.S. Constitution, Colorado's medical assistance program must cover abortions for women who become pregnant as a result of acts of rape or incest for so long as Colorado participates in the federal Medicaid program. *See* B-1.[1]

ADDITIONAL PROVISIONS AT ISSUE IN THIS CASE

Article VI, clause 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-333, § 509, 108 Stat. 2539, 2573 (1994),

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[1]Citations to the Appendix to the Petition for Certiorari are in the form "A-__"; those to the Appendix to this Brief are in the form "__a."

provides:

> None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the Federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest.

42 U.S.C. § 1396a(a)(10)(A) (1994) provides:

> A State plan for medical assistance must provide for making medical assistance available, including at least the care and services listed in paragraphs (1) through (5), (17) and (21) of section 1396d(a) of this title . . . .

42 U.S.C. §§ 1396d(a)(1)-(5) (1994) provide in relevant part:

> (1) inpatient hospital services (other than services in an institution for mental diseases); (2)(A) outpatient hospital services . . . ; (3) other laboratory and X-ray services; (4)(A) nursing facility services . . . ; (B) early and periodic screening, diagnostic and treatment services . . . for individuals . . . under the age of 21; (C) family planning services . . . ; (5)(A) physicians' services furnished by a physician . . . .

COUNTERSTATEMENT OF THE CASE

On October 21, 1993, President Clinton signed into law the fiscal year 1994 appropriations bill for the Departments of Labor, Health and Human Services and Education, which includes the 1994 version of the "Hyde Amendment," an annual rider prohibiting federal reimbursement for abortions except in a narrow range of circumstances. *See* Pub. L. No. 103-112, § 509, 107 Stat. 1082, 1113 (1993). The 1994 Hyde Amendment, which appropriated federal funds for abortions necessary to save the life of the pregnant woman or when the pregnancy resulted from an act of rape or incest, marked a significant expansion in federal funding for abortion services. Between 1981 and 1993, the annual Hyde Amendment appropriated federal Medicaid funds for abortion services only when the pregnant woman's life was at risk. Despite vigorous attempts in Congress to amend it,[2] the 1995 Hyde Amendment is identical to the 1994 Hyde Amendment. *See* Pub. L. No. 103-333, § 509, 108 Stat. 2539, 2573 (1994).

This case was commenced on November 8, 1993, seeking declaratory and injunctive relief barring enforcement of Article V, section 50 of the Colorado Constitution, its implementing statutes and regulations,[3] and the provisions of the Colorado state plan that relate to abortion funding (together, the "challenged provisions"), for so long as Colorado receives federal Medicaid funding. The challenged provisions would deny Colorado Medicaid recipients coverage for abortions except when necessary to

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[2]*See* note 7, *infra.*

[3]Colo. Rev. Stats. §§ 26-4-105.5, 26-4-512, 26-15-104.5 (1989 and Supp. 1995), Department of Social Services § 8.733, 10 Colo. Code Regs. § 2505-10 (1995).

save a pregnant woman's life. Respondents claimed that, pursuant to the Supremacy Clause of the United States Constitution, the challenged provisions must be enjoined because they directly conflict with federal law which, as of the outset of the 1994 federal fiscal year, mandates Medicaid coverage for abortions for rape and incest victims.

On December 14, 1993, after petitioner had moved to dismiss the complaint, respondents cross-moved for summary judgment. On April 28, 1994, while respondents' motion for summary judgment was pending, respondents moved for a temporary restraining order and/or preliminary injunction, seeking a court order that a Colorado Medicaid recipient, Jane Courage, who was 11 weeks pregnant as a result of a rape that was reported to the police, was entitled to Medicaid coverage for the abortion she sought. On May 5, 1994, the United States District Court for the District of Colorado (Nottingham, J.) held a preliminary injunction hearing at which respondents presented testimony from three witnesses regarding the irreparable injury caused by the challenged provisions to low-income women who become pregnant from rape or incest. At the conclusion of the evidence, the district court, with the agreement of all parties, consolidated the preliminary injunction motion with the trial on the merits, pursuant to Fed. R. Civ. P. 65(a)(2).

The district court granted respondents' motion for summary judgment, ruling that the Colorado Medicaid program must cover all abortions for which federal reimbursement is provided, and that Colorado law prevented such coverage. He stated:

> In 1984, the People of the State of Colorado enacted a provision amending the Colorado Constitution in a way that is narrower than the Hyde Amendment. The

> circuit courts' decisions that interpret the Social Security Act or the Medicaid Act and the Hyde Amendment are clear, and I have heard no persuasive basis for distinguishing this case from those cases . . . .
>
> I counted four circuit court decisions . . . , and I'm just going to cite them, I'm not going to discuss them because they contain, in themselves, the reasoning which I adopt. (Citations omitted.)

4a.[4]

Defendant sought a stay pending appeal from the district court, which plaintiffs opposed. The district court denied the motion from the bench, holding:

> [t]he testimony here concerning the injury which will occur to pregnant women who are pregnant as a result of rape or incest . . . is compelling to the effect that it endangers their health, in some cases, it endangers their life, and I do not weigh that very lightly in the balance, even the balance [as stated by defendant's counsel that the state of Colorado will have to withdraw from the Medicaid program].

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[4]On May 12, 1994, the district court issued a written Order Granting Final Injunctive Relief, formalizing the Court's May 5 ruling. *See* C-1.

9a.[5]

On May 9, 1994, petitioner filed a Notice of Appeal of the final judgment of the district court entered from the bench on May 5, 1994. On June 8, 1995, the United States Court of Appeals for the Tenth Circuit unanimously affirmed the district court. *See* B-1. Colorado's petition for rehearing and suggestion for rehearing *en banc* was denied on July 19, 1995. *See* A-1.

REASONS FOR DENYING THE WRIT

Petitioner's request for a writ of certiorari must be denied because he has failed to establish any of the factors that weigh in favor of granting the petition. Petitioner does not claim that the decision of the Court of Appeals for the Tenth Circuit is in "conflict with the decision of another United States court of appeals on the same matter." Sup. Ct. R. 10.1(a). Nor could he do so. Indeed, the decision of the court below is in complete harmony with the decisions of the Courts of Appeals for the First, Third, Fifth, Seventh and Eighth Circuits, as well as seven recent decisions of United States district courts that have not been appealed or in which appellate rulings have not yet been rendered. On this issue, which has been litigated extensively in the federal courts over the last fifteen years, there is no standing contrary precedent.

Petitioner argues that his petition should be granted because the court below "decided an important question of federal law which has not been, but should be, settled by

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[5]The Court of Appeals for the Tenth Circuit also denied petitioner's motion for a stay of the district court's injunction pending appeal or, in the alternative, a modification of that injunction. *Hern v. Beye*, No. 94-1205 (10th Cir. May 31, 1994).

this Court," Sup. Ct. R. 10.1(c), and "decided a federal question in a way that conflicts with applicable decisions of this Court." *Id.* Petitioner is incorrect on both counts. First, petitioner's misinterprets this Court's ruling in *Harris v. McRae*, 448 U.S. 297 (1980), which strongly supports the result reached by the lower court. Second, petitioner purports to find a conflict between the lower court's ruling and two inapposite decisions of this Court – *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981) and *South Dakota v. Dole*, 483 U.S. 203 (1987). Neither *Pennhurst* nor *South Dakota v. Dole* have anything do to with state obligations under the federal Medicaid program or with abortion. Rather, petitioner invokes these cases for the generic proposition that congressional conditions on a state's receipt of federal funds must be unambiguous. What petitioner fails to note, however, is that for over fifteen years federal law has, in fact, been unambiguous that state Medicaid programs must cover all medically necessary abortion services for which federal funding is not proscribed.

Moreover, because the lower federal courts have reached a uniform result in the numerous cases addressing this precise issue, and this Court has already denied a writ of certiorari in two of those cases, there is no compelling reason for this Court to use its limited resources to review this matter. The petition therefore must be denied.

I. THE LOWER FEDERAL COURTS HAVE UNIFORMLY AGREED THAT STATE MEDICAID PROGRAMS MUST COVER ABORTIONS FOR WHICH FEDERAL FUNDING IS NOT PROSCRIBED

The lower court's decision ordering the Colorado medical assistance program (so long as it participates in the

federal Medicaid program) to cover abortions for rape and incest victims for so long as federal funding is not proscribed for such procedures, is in complete accord with every standing decision of the federal appellate and district courts to decide this question. *See Hope Medical Group for Women v. Edwards*, 63 F.3d 418, 428 (5th Cir. 1995), *reh'g denied*, No. 94-30445 (5th Cir. Oct. 17, 1995), *aff'g* 860 F. Supp. 1149 (E.D. La. 1994), *stay denied*, 115 S. Ct. 1 (1994) (Scalia, J.); *Little Rock Family Planning Services, P.A. v. Dalton*, 60 F.3d 497, 502-03 (8th Cir. 1995), *reh'g denied*, No. 94-2885EALR (8th Cir. Sept. 22, 1995), *reh'g en banc denied*, No. 94-3903NEL (8th Cir. Sept. 22, 1995), *aff'g* 860 F. Supp. 609 (E.D. Ark. 1994) & *Orr v. Nelson*, 874 F. Supp. 998 (D. Neb. 1995); *Elizabeth Blackwell Health Center for Women v. Knoll*, 61 F.3d 170, 177 (3d Cir. 1995), *reh'g en banc denied*, No. 94-1954 (3d Cir. Aug. 24, 1995), *aff'g* No. 94-CV-0169, 1994 U.S. Dist. LEXIS 13295 (E.D. Pa. Sept. 15, 1994); *Roe v. Casey*, 623 F.2d 829, 836-37 (3d Cir. 1980); *Reproductive Health Services v. Freeman*, 614 F.2d 585, 596 (8th Cir.), *vacated on other grounds*, 449 U.S. 809 (1980); *Zbaraz v. Quern*, 596 F.2d 196, 199 n.7 (7th Cir. 1979), *cert. denied*, 448 U.S. 907 (1980); *Hodgson v. Board of County Comm'rs, County of Hennepin*, 614 F.2d 601, 605 (8th Cir. 1980); *Preterm, Inc. v. Dukakis*, 591 F.2d 121, 134 (1st Cir.), *cert. denied*, 441 U.S. 952 (1979); *Utah Women's Clinic, Inc. v. Graham*, 892 F. Supp. 1379, 1384 (D. Utah 1995); *Fargo Women's Health Org. Inc. v. Wessman*, No. A3-94-36, slip op. at 25 (D. N.D. Mar. 15, 1995), *stay pending appeal denied*, No. 95-1920NDF (8th Cir. June 12, 1995); *Stangler v. Shalala*, No. 94-4221-CV-C-5, slip op. at 11 (W.D. Mo. Dec. 28, 1994); *Planned Parenthood v. Wright*, No. 94 C 6886, 1994 WL 750638, at *3 (N.D. Ill. Dec. 6, 1994); *Planned Parenthood Affiliates of Michigan v. Engler*, 860 F. Supp. 406, 410 (W.D. Mich. 1994), *stay pending appeal denied*, Nos. 94-1913 & 94-2097 (6th Cir. Jan. 20, 1995),

appeal and cross-appeal argued, Nos. 94-1913 & 94-2097 (6th Cir. Oct. 13, 1995); *Planned Parenthood of Missoula Inc. v. Blouke*, 858 F. Supp. 137, 142 (D. Mont. 1994); *see also Hope v. Childers*, No. 3:95CV-518-S (W.D. Ky. July 20, 1995) (order granting preliminary injunction).[6]

In two of these cases -- *Zbaraz v. Quern*, 596 F.2d 196 (7th Cir. 1979), *cert. denied*, 448 U.S. 907 (1980), and *Preterm, Inc. v. Dukakis*, 591 F.2d 121 (1st Cir.), *cert. denied*, 441 U.S. 952 (1979) -- this Court denied petitions for certiorari. In view of the extensive, and uniformly decided, body of case law handed down since those petitions were denied, there is even less reason to review the lower court decision at issue here than the ones at issue in *Zbaraz* and *Preterm*. Indeed, in denying an application for a stay pending appeal in *Hope Medical Group for Women v. Edwards*, Justice Scalia recognized that:

> [t]he Courts of Appeals to address th[e] question [of whether Title XIX requires States participating in the Medicaid program to fund abortions unless federal funding for those procedures is proscribed by the Hyde Amendment] have uniformly supported that premise . . . . We have already denied certiorari in two of those cases, and it is in my view a certainty that four Justices will not be found to vote for certiorari on the Title XIX question unless

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[6]One state court has also reached this result. *See Jeanette R. v. Ellery*, No. BDV-94-811 (Mont. Dist. Ct. June 1, 1994) (annexed as an Appendix to the district court's opinion in *Little Rock Family Planning Services, P.A.*, 860 F. Supp. at 628) (preliminarily enjoining Montana from denying Medicaid coverage for abortions for rape and incest victims).

and until a conflict in the Circuits appears.

115 S. Ct. at 2 (citations omitted). No conflicts in the Circuits having appeared, this Court should follow Justice Scalia's well-grounded reasoning and deny this petition.

II. THE LOWER COURT'S DECISION IS CONSISTENT WITH THE STRUCTURE OF THE FEDERAL MEDICAID ACT, THIS COURT'S DECISION IN *HARRIS v. MCRAE*, AND THE ADMINISTRATIVE AGENCY'S INTERPRETATION

Not only have the lower federal courts been uniform in their treatment of the question presented for review, the result they have reached is supported by the structure of the federal Medicaid Act, this Court's decision in *Harris v. McRae*, and the guidance of the Health Care Financing Administration ("HCFA") of the United States Department of Health and Human Services ("HHS"), which is charged with overseeing the federal Medicaid program.

A. The Structure of the Medicaid Act and *Harris v. McRae* Support the Result Reached by the Lower Court

The federal Medicaid program (established pursuant to Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396u (1994)) is a federal-state cooperative program that enables participating states, with the aid of federal funds, to provide medical services to needy individuals. "Although participation in [Medicaid] is voluntary, participating States must comply with certain requirements imposed by the Act and regulations promulgated by the Secretary of Health and Human Services." *Wilder v. Virginia Hospital Ass'n*, 496

U.S. 498, 502 (1990).

Under Title XIX, certain categories of medical care are "mandatory," and must be provided by every state Medicaid program. *See* 42 U.S.C. § 1396a(a)(10)(A) ("A State plan for medical assistance must provide for making medical assistance available, including at least the care and services listed in paragraphs (1) through (5) . . . of section 1396d(a) of this title."). The mandatory categories of care include:

> (1) inpatient hospital services (other than services in an institution for mental diseases); (2)(A) outpatient hospital services . . . ; (3) other laboratory and X-ray services; (4)(A) nursing facility services . . . ; (B) early and periodic screening, diagnostic and treatment services . . . for individuals . . . under the age of 21; (C) family planning services . . . ; (5)(A) physicians' services furnished by a physician . . . .

42 U.S.C. §§ 1396d(a)(1)-(5). A state plan must cover medical services that fall within the mandatory categories of care which an individual's physician certifies as "medically necessary." *See Weaver v. Reagen*, 886 F.2d 194, 200 (8th Cir. 1989) (Medicaid must cover medically necessary AZT treatments); *Pinneke v. Preisser*, 623 F.2d 546, 550 (8th Cir. 1980) (Medicaid must cover medically necessary sex reassignment surgery); *Allen v. Mansour*, 681 F. Supp. 1232, 1237-38 (E.D. Mich. 1986) (Medicaid must cover medically necessary liver transplant surgery), *appeal dismissed and order vacated as moot*, 1991 U.S. App. LEXIS 4710 (6th Cir. Mar. 19, 1991).

Because abortion falls within several of the categories

of mandatory covered services identified in 42 U.S.C. § 1396d(a) -- "family planning services," "physicians' services," "outpatient hospital services," "inpatient hospital services" -- between 1973 and 1976, state Medicaid programs were required to cover medically necessary abortions. As the Court of Appeals for the Eighth Circuit held in *Hodgson*, "[w]e think it plain that [Medicaid's mandatory services] include medical procedures to induce abortions." 614 F.2d at 607. *See also Doe v. Busbee*, 481 F. Supp. 46, 49 (N.D. Ga. 1979) ("[a]bortion is a medical service which falls within one or more of the five categories of medical service which must, as a minimum, be provided under a state's plan for medical assistance"); *Emma G. v. Edwards*, 434 F. Supp. 1048, 1050 (E.D. La. 1977) (state of Louisiana stipulated that medically necessary abortions were covered under Title XIX); *Coe v. Hooker*, 406 F. Supp. 1072, 1082-83, 1086 (D.N.H. 1976) (medically necessary abortions are a covered service under Medicaid); *Dodge v. Department of Social Services*, 657 P.2d 969, 974 (Colo. Ct. App. 1982) ("abortion is a medical procedure . . . . When performed by physicians, this medical procedure necessarily involves physician services. It may also involve inpatient or outpatient hospital services, or both, as well as other statutorily defined categories of authorized medical services in some circumstances").

In 1976, Congress passed what is commonly called the Hyde Amendment, which prohibits federal reimbursement for abortions except in the narrow circumstances that Congress deems to be medically necessary. Each year since 1976, Congress has added a "Hyde Amendment" to annual appropriations bills for the U.S. Department of Health and

Human Services.[7] The circumstances in which federal funds have been appropriated for low-income women's abortions has varied. Between fiscal years 1982 and 1993, the Hyde Amendment limited federally funded abortions to situations where the life of the pregnant woman would be threatened by carrying the pregnancy to term.[8]

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[7]The State of Colorado did not choose to restrict coverage of abortion services under its state Medicaid plan until 1984, when Article V, section 50 was added to the Colorado Constitution after passage by initiative vote. The Colorado General Assembly subsequently passed Colo. Rev. Stats. §§ 26-4-105.5 and 26-4-512, implementing Article V, section 50 under the Colorado Medical Assistance Act, and § 26-15-104.5, implementing Article V, section 50 under the Reform Act for the Provision of Health Care for Medically Indigent, and the Department of Social Services adopted § 8.733, 10 Colo. Code Regs. 2505-10 (1995), detailing procedures to be followed when public funds are used for abortions. Prior to 1984, Colorado covered all medically necessary abortions in its Medicaid program using state funds.

[8]For several years the Hyde Amendment contained a proviso explicitly giving state Medicaid programs the option not to cover even those abortions for which federal funding was available. The provision stated: "Provided, however, That the several States are and shall remain free not to fund abortions to the extent that they in their sole discretion deem appropriate." *See* Pub. L. No. 96-369, § 101(c), 94 Stat. 1352, 1353 (1980); Pub. L. No. 96-536, § 109, 94 Stat. 3166, 3170 (1980); Pub. L. No. 97-12, §§ 401-02, 95 Stat. 14, 95-96 (1981); Pub. L. No. 97-377, § 204, 96 Stat. 1830, 1894 (1982). This "state-option" proviso to the Hyde Amendment has not been enacted since 1982, although it was proposed and rejected in 1995. *See* Jerry Gray, *The 104th Congress: Spending Cuts*, N.Y. Times, March 3, 1995, at A-19 (discussing amendment added by House Appropriations Committee to budget rescissions bill, which would have given states the option of not covering Medicaid abortions for rape and incest victims); David E. Rosenbaum, *House Committee Supports Tax Cut*, N.Y. Times, March 15, 1995, at A-1 (reporting that the "state option" Medicaid abortion provision had been eliminated from the rescissions bill).

In 1980, in *Harris v. McRae*, this Court upheld, against statutory and constitutional challenge, congressional restrictions on federal funding of abortion services for the poor. *McRae* directly supports the result reached by the lower court here. In challenging the Hyde Amendment, the plaintiffs in *McRae* argued that despite the withdrawal of federal funds for non-lifesaving abortions, state Medicaid programs continued to be obligated under Title XIX to cover all medically necessary abortions, even if they had to pay for the procedures entirely with state funds. *See McRae*, 448 U.S. at 307-08 ("[i]t is thus the appellees' view that the effect of the Hyde Amendment is to withhold federal reimbursement for certain medically necessary abortions, but not to relieve a participating State of its duty under Title XIX to provide for such abortions in its Medicaid plan"). This Court rejected that argument, holding that Congress "did not intend a participating State to assume a unilateral funding obligation for any health service in an approved Medicaid plan." *Id.*, at 309. It stated: "Title XIX does not require a participating State to pay for *those* medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment." *Id.*, at 311 (emphasis added).

The plain implication of this Court's holding in *McRae* is that Title XIX requires states to cover those medically necessary abortions for which the funding obligation is not "unilateral," 448 U.S. at 309, and for which federal reimbursement *is* available under the Hyde Amendment. In other words, to the extent that federal funding for medically necessary abortions is not proscribed by the Hyde Amendment, participating states are obligated to continue covering medically necessary abortions, as they did before

the Hyde Amendment was enacted.[9]

B. HCFA's Directive to State Medicaid Directors Supports the Lower Court's Decision

Concurring with this analysis, on December 28, 1993, the director of the Medicaid Bureau of HCFA advised state Medicaid directors that, effective October 1, 1993, all state medical assistance plans must cover abortions for which federal funds are appropriated under the current Hyde Amendment (the "HCFA Directive"). *See* 1b. In relevant part, the HCFA Directive provides:

> As with all other mandatory medical services for which Federal funding is available, States are required to cover abortions that are medically necessary. By definition, abortions that are necessary to save the life of the mother are medically necessary. In addition, Congress this year added abortions for pregnancies resulting from rape and incest to the category of medically necessary abortions for which funding is provided . . . . [W]e believe that this change in the text of the Hyde Amendment signifies Congressional intent that abortions of pregnancies resulting from rape or incest are medically necessary in light of both medical and psychological health factors. Therefore,

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[9]Petitioner's request that this Court should grant the petition to decide the question left open in *McRae* regarding whether the Hyde Amendment substantively amends Title XIX must be rejected. As shown herein, the lower court's decision is legally correct regardless of whether the Hyde Amendment substantively amends Title XIX.

> abortions resulting from rape or incest should be considered to fall within the scope of services that are medically necessary.

2b.[10] HCFA's interpretation of participating states' obligations under the Hyde Amendment and Title XIX is entitled to substantial deference by this Court. *See National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992) ("[j]udicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well settled principle of federal law"); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (reasonable agency determination must be accorded "considerable weight").

The fact that outdated HHS regulations purport to limit federal Medicaid funding for abortions exclusively to when the pregnant woman's life is at risk, *see* 42 C.F.R. §§ 441.202, 441.203, 441.206 (1991), is irrelevant here. The 1987 HHS regulations cited by petitioner cannot take precedence over a duly enacted federal statute -- such as the current version of the Hyde Amendment -- which plainly allocates federal funds for abortions to terminate

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[10]Contrary to petitioner's argument, respondents do not claim that every Medicaid-eligible woman or girl who is pregnant as a result of rape or incest has, as a matter of law, a medical need for an abortion. Rather, they claim that if a low-income woman's physician determines "in the light of all factors -- physical, emotional, psychological, familial, and the woman's age -- relevant to the well-being of the patient," *Doe v. Bolton*, 410 U.S. 179, 192 (1973), that an abortion to terminate a pregnancy resulting from rape or incest is in the interests of a patient's health and thus medically necessary, federal law requires that the procedure be covered by Medicaid. Moreover, it cannot be disputed that some rape and incest victims have a medical need to terminate the pregnancy. *See* 9a.

pregnancies resulting from rape or incest. *See* Pub. L. No. 103-333, § 509, 108 Stat. 2539, 2573 (1994).

C. Because the Challenged Provisions Directly Conflict with Federal Law, the Supremacy Clause Requires That They Be Enjoined

The Supremacy Clause, Article VI, clause 2 of the United States Constitution, requires invalidation of any state constitutional or statutory provision that conflicts with federal law. *See, e.g., Van Lare v. Hurley*, 421 U.S. 338, 346-47 (1975) (New York regulations reducing shelter allowance to AFDC recipients are invalid because they conflict with Title XIX and federal regulations). Because Title XIX and the 1994 and 1995 Hyde Amendments, when read together, mandate coverage of abortions for low-income rape and incest victims -- which the challenged provisions prohibit -- the Supremacy Clause requires invalidation of the challenged provisions; this is precisely what the lower court here held.

III. THE LOWER COURT'S DECISION IS CONSISTENT WITH *PENNHURST* AND *SOUTH DAKOTA v. DOLE*

Petitioner's attempt to find a conflict between the lower court's decision and this Court's decisions in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981) and *South Dakota v. Dole*, 483 U.S. 203 (1987), is unavailing. *Pennhurst* involved the rights of mentally retarded individuals under the federal Developmentally Disabled Assistance and Bill of Rights Act ("DDABRA"). In *Pennhurst*, this Court reversed the novel holding of the Court of Appeals for the Third Circuit that the "bill of rights" provision in the DDABRA created enforceable rights and obligations, in part because that provision did not

unambiguously create any enforceable rights. Here, there is no question that the Medicaid Act -- by its terms -- requires state Medicaid programs to cover medically necessary services that fall within the mandatory areas of care. *See* 42 U.S.C. § 1396a(a)(10)(A). There is also no question that private citizens have the right to enforce that mandate. *See, e.g.*, cases cited at 11, *supra*.[11] Also, unlike the claims of the plaintiffs in *Pennhurst*, the respondents here do not claim that Colorado must fund "newly declared individual rights . . . 'that Congress itself is unwilling to fund.'" *Pennhurst*, 451 U.S. at 22 (quoting *McRae*, 448 U.S. at 309). Rather, they claim that Colorado must comply with well-established and longstanding federal law by covering the very medical procedures for which Congress has appropriated federal funds.

Moreover, unlike the claims of the petitioner in *Pennhurst*, petitioner here cannot reasonably claim that he was unaware that the Hyde Amendment provides a floor for Medicaid coverage of abortion. By 1984, when the challenged provisions were adopted, several federal appellate courts had already decided that state Medicaid programs must fund abortions for which federal funding is not proscribed. *See Roe v. Casey; Reproductive Health Services; Hodgson; Zbaraz; Preterm.*

South Dakota v. Dole, which upheld a federal statute mandating that a percentage of otherwise allocable federal highway funds be withheld from states where the lawful drinking age is less than twenty-one years, is also consistent with the lower court's decision here. In that case, this Court held that "Congress may attach conditions on the

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[11]For this reason, petitioner's reliance on *Suter v. Artist M.*, 503 U.S. 347 (1993), is entirely misplaced.

receipt of federal funds . . . 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'" *Dole*, 483 U.S. at 206 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980)). That is precisely what has occurred here: to further the policy objective of ensuring that low-income rape and incest victims are not compelled by their poverty to bear unwanted children conceived in brutal crimes, Congress has conditioned participation in the federal Medicaid program on compliance with federal statutes, which currently require Medicaid coverage of abortions for rape and incest victims.

CONCLUSION

Although this Court has not squarely ruled on the issue presented here, there is no reason for it to use its limited resources to do so. The lower court's ruling is in harmony with every standing federal decision on this issue, is supported by this Court's prior related decision in *Harris v. McRae*, as well as by the federal Medicaid Act and the HCFA Directive, and is fully consistent with the decisions of this Court cited by petitioner. For the reasons stated herein, the petition for a writ of certiorari must be denied.

Dated: November 3, 1995

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

WARREN M. HERN, M.D., et al.,	)	
Plaintiffs,	)	
vs .	)	93 N 2350
KAREN BEYE, et al.,	)	
Defendants.	)	

EXCERPTS OF
HEARING - PRELIMINARY INJUNCTION
PARTIAL TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE EDWARD W . NOTTINGHAM, U. S. District Judge for the District of Colorado, beginning at 9:00 a.m. on the 5th day of May, 1994, Courtroom C-203, United States Courthouse, Denver, Colorado.

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Proceedings recorded by electronic sound recording; transcript produced by transcription service.

PROCEEDINGS

(Whereupon, the following consists of a partial transcript of the proceedings held, as requested.)

THE COURT: All right, the matter is before the Court on a motion for a preliminary injunction, which with the agreement and consent of all parties, is being converted to a motion--or to a hearing on the merits of the case.

It seems to me the issue in this case is relatively narrow and relatively clear once I had a chance to focus on it and spend some time on it.

The issue has nothing to do with the wisdom of any particular rule of law. The issue is whether the federal statute prevails. And it's worth quoting the supremacy clause in light of the distinction that is alluded to in some of the State's papers concerning the distinction between a state constitutional provision and a state statutory provision.

The supremacy clause of the United States Constitution says, "The Constitution and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land, and the judges of every state shall be bound thereby, anything in the constitution or laws of any state to the contrary not withstanding."

So that's the issue; whether the state constitutional provision and the state statutory materials that are enacted pursuant to that constitutional provision can stand up in light of the requirements of the Medicaid Act and the Hyde Amendment.

. . .

Now I turn to the merits of the case. The two relevant federal statutes are Title 19 of the Social Security Act, commonly known as the Medicaid Act or Medicaid Program, and the most recent version of the Hyde Amendment which was enacted in

1993. The most recent version of the Hyde Amendment, which differs somewhat from some of the prior versions, says, "None of the funds appropriated under this Act, which was the Appropriations Act for the Department of Health and Human Services last year for fiscal year 1994, shall be expended for any abortion, except when it is made known to the federal entity or official to which funds are appropriated under this Act, that such procedure is necessary to save the life of the mother, or that the pregnancy is the result of an act of rape or incest."

In 1984, the People of the State of Colorado enacted a provision amending the Colorado Constitution in a way that is narrower than the Hyde Amendment. The circuit courts' decisions that interpret the Social Security Act or the Medicaid Act and the Hyde Amendment are clear, and I have heard no persuasive basis for distinguishing this case from those cases, or from -- or for saying that those cases were wrongly decided.

I counted four circuit court decisions rather than three that fell into the category, and I'm just going to cite them, I'm not going to discuss them because they contain, in themselves, the reasoning which I adopt. The First Circuit case is Preterm Incorporated versus Dukakis reported at 591 F.2d 121, a 1979 case. The Third Circuit case is Roe versus Casey reported at 623 F.2d 829. That is a 1980 case, and that one is as close on point as cases usually get. The Seventh Circuit case is Zbaraz versus Quern, 596 F.2d 196. That's a 1979 case. And also I rely on the Eighth Circuit's decision Hodgson versus Board of County Commissioners, County of Hennepen, 614 F.2d 601. That's a 1980 case.

Now, the defendants suggest that Harris versus McRay somehow undermined the holding of these four decisions. I do not read the Harris case in that manner. The Harris case started out with the proposition that's conceded by everybody here, and that is that a state that participates in the Medicaid program is not obligated under title 19 to continue to fund those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment.

The court further found that the Hyde Amendment violated neither the Fifth Amendment nor the establishment clause of the First Amendment. In the course of doing that, the court cited with approval each of the four circuit decisions that I've talked about.

The court in Harris, I conclude, was assuming that funding was required for all abortions for which federal funding was available. And this conclusion is buttressed by the court's earlier admonition in Beal versus Stowe, where the court observed that serious statutory questions might be presented if a state Medicaid plan excluded necessary medical treatment from its coverage. So I think Harris versus McRay is perfectly consistent with the four decisions in question.

Now, the State also relies on an older Tenth Circuit decision, Doe versus Rose, which actually was handed down before there ever was any version of the Hyde Amendment. The defendant argues that the Tenth Circuit held in Doe versus Rose, that federal Medicaid statutes do not require the states to fund any abortions at all.

The reliance evidently is on dicta in Rose, in which the Court states, "The court lacks specific guidance as to whether Congress intended that abortions be covered by Medicaid and if so, more critically which abortions were to be covered by Medicaid benefits." And then the court went on to invalidate all abortion funding restrictions on constitutional grounds. So in a sense, the Rose case is actually broader than what I'm being asked to do here, much broader.

The Hyde Amendment, series of amendments to -- riders to appropriation bills which started I think in 1976 or '77, as I recall, obviate any uncertainty that the Tenth Circuit may have had in 1974. And I simply cannot read the Tenth Circuit dicta as a prohibition on the use of state funds to finance any abortions at all.

So I'm not persuaded that the Rose case is inconsistent with

the result that I've arrived at and with the result of four other circuit courts.

The next issue is the relief requested, and a sub-issue there is whether it is possible to sever one part of the constitutional amendment from other parts of the constitutional amendment. I do not conclude that this is a case where the constitutional amendment contains several parts so that we can sever one part of the amendment out, the offending part, and allow the rest to stand. The amendment as a whole would have to be redrafted in order to comply with federal law. And I do not understand how, as defendant suggests, that it could be read to comply with federal law by giving it the fullest effect possible.

I'm persuaded by the Third Circuit's position that the amendment here would -- that redrafting the amendment by a federal court would be improper for several reasons. First of all, there's an issue as to whether the State officials and/or the People of the State of Colorado would continue in the Medicaid program at all if the Hyde Amendment were enforced. I think the people and the defendant here and the other officials of the State of Colorado responsible for administering the program should be given the opportunity to decide whether they wish to continue to receive federal funds under the Medicaid Act. That was the reason that I asked counsel the question about the proper relief in this case.

The second reason for refusing to redraft the amendment in the one that was expressed by the Third Circuit. I just simply don't think it's a proper function of a federal district court to engage in drafting state constitutional amendments or state statutory provisions.

So the remedy here is to enjoin some action, and as I said earlier, I think that the proper remedy is to issue a permanent injunction enjoining the defendant from enforcing Article 5, Section 50 of the Colorado Constitution, and Section 26-4-105.5 and 26-4-512 of the Colorado Revised Statutes, and Rule 8.733 in the Colorado Code of Regulations, Title 10, section 2505.10, and

the Colorado State Medicaid Plan until, or so long as, I should say, the state is accepting monies from the federal government under Title 19 of the Social Security Act, commonly known as the Medicaid Act.

So that will be the order of the Court. The plaintiff's motion for summary judgment is granted. The defendant's motion to dismiss is denied.

Anything further?

MS. KOLBERT: No, Your Honor. Thank you.

THE COURT: Mr. Livingston?

MR. LIVINGSTON: Thank you, Your Honor. Two matters very briefly; one is we would ask that the injunction also contain the proviso that that injunction is also only in force as long as the Hyde Amendment, current version of the Hyde Amendment, or something similar, is in effect. I mean, obviously, if Congress decides to change the Hyde Amendment next October, then there would be no necessity for us to fund those abortions and not receive the federal Medicaid funds.

THE COURT: Well, Congress can do whatever it wants to in any case with a court injunction. Why should I do that?

MR. LIVINGSTON: Well, it's an--

THE COURT: I mean, if Congress changes the law, then I'll decide under the new law.

MR. LIVINGSTON: Thank you, Your Honor. That's all I wanted to clarify.

The other point, Your Honor, is that I will be as candid with the Court as I possibly can be. I think that as the Court said, the People of the State of Colorado are now faced with the choice of whether they choose to participate in the Medicaid program or

not, and that will take some time to do in order to propose a constitutional amendment and to put that before the people. I can state for the record that in this case, the defendants feels they have no choice but to seek appellate review in this case, and we would ask for a stay of the Court's injunction pending the appeal.

THE COURT: What's the plaintiff's position?

MS. KOLBERT: Your Honor, the testimony today was significant as to the harms of women that would ensue should this constitutional amendment be enforced. The harm to the state pending review is just the contrary, that is, it's a question of financing, it is a question of state money, a very, very small percentage of state money. In fact, the federal government will pay half of what they're being obligated to pay beginning today. And, in fact, may, given the testimony today, save the state dollars by continuing to permit abortions, because they will eliminate the obligation of paying for pregnancies that are carried to term as a result of that funding policy.

Your Honor, we would oppose any effort for a stay pending appeal. We certainly -- the state is free to seek expedited review as they may so choose, but we think the order of this Court must remain to protect rape and incest victims pending that appellate review.

MR. LIVINGSTON: May I respond just very briefly, Your Honor?

THE COURT: All right, yes.

MR. LIVINGSTON: I think -- I do want to be very practical here. I don't think the defendant has the authority under the Colorado Constitution to pay for these abortions. She does have the authority to withdraw from the Medicaid program. If that is the result of the Court's ruling today, the damage to the State of Colorado will be the loss of approximately $500 million annually in federal funds, provide medical services to poor, indigent and disabled people in the State of Colorado.

I don't want to be an alarmist, but I think that is the result of the Court's ruling today.

THE COURT: Wait a minute. Run that one by me again.

MR. LIVINGSTON: The defendant, Karen Beye, has to abide by the State Constitution, and she can do so by withdrawing from the Medicaid program.

THE COURT: Well, she has to abide by federal law.

MR. LIVINGSTON: And as this Court has ordered, she has the choice of withdrawing from Medicaid or paying for these abortions.

THE COURT: Well, if she wants to take the responsibility of withdrawing from the Medicaid program, I can't do much about it.

MR. LIVINGSTON: I appreciate the Court's position. What I'm trying to say is she will have no choice either and she will have to withdraw.

THE COURT: All right, I've heard enough argument. The motion for stay is denied. The testimony here concerning the injury which will occur to pregnant women who are pregnant as a result of rape or incest, although most of the testimony relates to rape, is compelling to the effect that it endangers their health, in some cases, it endangers their life, and I do not weigh that very lightly in the balance, even the balance as you've articulated it, Mr. Livingston.

So if you want your stay and the appellate court will give you a stay, that's where you're going to have to go.

Anything further?

MR. LIVINGSTON: Nothing further, Your Honor.

THE COURT: Court's in recess.

(Whereupon, the requested portion of the proceedings was concluded.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

May 9, 1994

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Letter from Sally K. Richardson, Director, Medicaid Bureau, Health Care Financing Administration, United States Department of Health and Human Services to State Medicaid Directors

December 28, 1993

Dear State Medicaid Director:

The purpose of this letter is to notify you about a recent Congressionally enacted revision to the "Hyde Amendment" which affects the Medicaid program and to tell you how this revision in the law is to be implemented.

Effective October 1, 1993, as part of P.L. 103-112, the Health and Human Services Appropriation bill, Congress passed a revision of the Hyde Amendment pertaining to Federal funding of abortions under the Medicaid program. As enacted, the provision states:

> None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the Federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest.

Thus, Federal funding (FFP) is now available for abortions performed to save the life of the mother or to terminate pregnancies resulting from rape or incest when the claim for such an abortion is paid by the State on or after October 1, 1993. Please note that it is the date that the State pays the claim and not the date of the service which determines the availability of FFP.

In order to implement this provision of the law, we are requesting that beginning with the first Quarterly Expenditure Report (HCFA-64) for fiscal year (FY) 1994 in January, States submit to the Health Care Financing Administration (HCFA) regional office (RO) a form certifying the number of abortions performed to save

the life of the mother, the number performed for a pregnancy resulting from an act of rape, and the number performed for a pregnancy resulting from an act of incest. This certification should be submitted to the RO on a quarterly basis with the completed HCFA-64.

Current regulations at 42 CFR 441.203 and 441.206 require that before FFP can be made available, the State must obtain a signed physician's certification that, based on the professional judgment of the physician, the abortion was necessary because "the life of the mother would be endangered if the fetus were carried to term." Because the language of the current Hyde Amendment differs somewhat from its predecessors, the State must change the wording of the physician's certification to comport with the current statutory language. With regard to this portion of the Hyde Amendment, the new legislative language, "to save the life of the mother," has essentially the same meaning as the previous legislation.

As with all other mandatory medical services for which Federal funding is available, States are required to cover abortions that are medically necessary. By definition, abortions that are necessary to save the life of the mother are medically necessary. In addition, Congress this year added abortions for pregnancies resulting from rape and incest to the category of medically necessary abortions for which funding is provided. Based on the language of this year's Hyde Amendment and on the history of Congressional debate about the circumstances of victims of rape and incest, we believe that this change in the text of the Hyde Amendment signifies Congressional intent that abortions of pregnancies resulting from rape or incest are medically necessary in light of both medical and psychological health factors. Therefore, abortions resulting from rape or incest should be considered to fall within the scope of services that are medically necessary.

The definition of rape and incest should be determined in accordance with each State's own law. States may impose reasonable reporting or documentation requirements on recipients

or providers, as may be necessary to assure themselves that an abortion was for the purpose of terminating a pregnancy caused by an act of rape or incest. States may not impose reporting or documentation requirements that deny or impede coverage for abortions where pregnancies resulted from rape or incest. To insure that reporting requirements do not prevent or impede coverage for covered abortions, any such reporting requirement must be waived and the procedure considered to be reimbursable if the treating physician certifies that in his or her professional opinion, the patient was unable, for physical or psychological reasons, to comply with the requirement.

State which have State Plan language more restrictive than that provided for under the revised Hyde Amendment may qualify for Federal funding for the first quarter of FY 94 if they submit approvable State Plan language changes by December 31, 1993.

By March 31, 1994, all States must ensure that their State Plans do not contain language that precludes FFP for abortions that are performed to save the life of the mother or to terminate pregnancies result from rape or incest.

As you know, it is necessary for States to adhere to all conditions for Federal Medicaid funding. As part of its ongoing State assessment and audit programs, HCFA may include reviews of abortion claims, if necessary, to assure compliance with these conditions.

Please call my office if you have any questions about this matter.

Sincerely yours,
/s/ SALLY K. RICHARDSON
Sally K. Richardson
Director
Medicaid Bureau

cc: All Regional Administrators

Supreme Court, U.S.
FILED
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(3)

No. 95-701

In The

Supreme Court of the United States

October Term, 1995

ALAN WEIL, Executive Director, Colorado Department of Health Care Policy and Financing, in his official capacity,

Petitioner,

vs.

WARREN M. HERN; GRAND JUNCTION WOMEN'S CLINIC; PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS; and MAYFAIR WOMEN'S CENTER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

1. Remarkably, Respondents concede that "this Court has not squarely ruled on the issue presented here," Opp. at 20, and have not attempted to argue – since they cannot – that the issue in this case is not an important one. Thus, they agree with the gravamen of the Petitioner's second argument, that this case is one where "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court . . . . " Rule 10(c), Rules of the Supreme Court of the United States (Oct. 2, 1995).[1]

2. Respondents argue that the decision below is consistent with this Court's decisions in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981) and *South Dakota v. Dole*, 483 U.S. 203, 207 (1987), because they believe that Congress has established an unambiguous requirement that States participating in Medicaid pay for abortions terminating pregnancies resulting from rape or incest. According to Respondents, this unambiguous requirement can be shown in three ways: (1) decisions by lower federal courts, (2) the language and structure of

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[1] At the same time, Respondents continue to assert that the decision below is consistent with *Harris v. McCrae*, 448 U.S. 297 (1980), but this assertion is empty. Opp. at 14. In *Harris*, the Court clearly said that States were not obligated to fund abortions if matching federal funds were not available, but just as clearly, did *not* say that the converse was true – that States must fund abortions if federal matching funds are available. *Id.* at 310 n.14. Thus, Petitioner's position is equally "consistent" with *Harris*, since *Harris* quite simply did not speak to the question presented.

Title XIX itself, and (3) an interpretation by a federal agency. Each of these claims is demonstrably in error.

Initially, Respondents urge that the decision below is in accord with decisions by all other federal appellate courts on this subject over the last fifteen years. In fact, all of these decisions fall into two groups: (1) decisions entered fifteen years ago, before this Court's decisions in *Harris v. McCrae*, *Pennhurst*, and *Dole*; and (2) decisions sparked by the most recent changes to the Hyde Amendment – decisions that are not yet final and that are often marked by vigorous dissents. For example, Judge Nygaard wrote an extensive dissent in *Elizabeth Blackwell Center for Women v. Knoll*, 61 F.3d 170, 185-97 (3d Cir. 1995), and Pennsylvania's petition for rehearing en banc was denied on a vote of 7 to 7 (No. 94-1954 (3d Cir. Aug. 24, 1995)). Judge Bowman dissented in *Little Rock Family Planning Services, P.A. v. Dalton*, 60 F.3d 497 (8th Cir. 1995), writing "Were we writing on a clean slate, I would be inclined to agree with the defendants that states participating in the Medicaid program are not required to fund abortions merely because Congress . . . has chosen to make federal reimbursement available." 60 F.3d at 504. Five of eleven judges voted to grant Nebraska's petition for rehearing en banc in that case (No. 94-3903NEL (8th Cir. Sept. 22, 1995)). Indeed, at least four more petitions for certiorari on similar questions are due to be filed in this Court in the near future: Nebraska (November 13), Pennsylvannia (November 22), Arkansas (December 21), and Louisiana (January 16). Accordingly, it is beyond dispute that at least a dozen circuit court judges and five

States believe this issue warrants review.[2] In light of this, the federal "requirement" at issue simply cannot be characterized as clear and unambiguous.

Respondents further argue that Title XIX plainly requires the States to fund these abortions, but this argument is without merit. According to Respondents, "there is no question that the Medicaid Act – by its terms – requires state Medicaid programs to cover medically necessary services that fall within the mandatory areas of care." Opp. at 18. However, this construction of Title XIX has been expressly rejected by most of the circuits, including the court below. *See* Pet. App. at B-8 ("Participating states are not required . . . to fund all medical services falling under one of the mandatory service categories.") *See also Preterm v. Dukakis*, 591 F.2d 121, 124-25 (1st Cir. 1979), *cert. denied*, 441 U.S. 952 (Title XIX contains "no mandate that all 'medically necessary' services be provided" and federal law does not create "a flat rule that all services within the . . . [mandatory] categories deemed 'medically necessary' by a patient's physician must be provided"); *Zbaraz v. Quern*, 596 F.2d 196, 198 (7th Cir. 1979), *cert. denied*, 448 U.S. 907 (1980) (Title XIX "does not require funding of all medical care which is deemed necessary by the treating physician."); *Roe v. Casey*, 623 F.2d 829, 832-33, n.9 (3d Cir. 1980) ("we would favor the

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[2] In addition, appeals are pending in cases arising out of Michigan (*Engler v. Planned Parenthood Affiliates of Michigan, appeal filed*, Nos. 94-1913 and 94-2097 (6th Cir. 1995)) and North Dakota (*Wessman v. Fargo Women's Health Org., appeal filed*, No. 95-1920NDF (8th Cir. 1995)).

narrower approach taken by the First and Seventh Circuits.") Only the Court of Appeals for the Eighth Circuit has adopted Respondents' position. *Little Rock Family Planning Services, P.A. v. Dalton*, 60 F.3d 497, 499 (8th Cir. 1995). The United States Court of Appeals for the Fifth Circuit demurred. *Hope Medical Group for Women v. Edwards*, 63 F.3d 418, 425 (5th Cir. 1995) ("Some courts have read [Title XIX] as mandating that states must cover all medical procedures certified as 'medically necessary' by a recipient's physician. Other courts have declined to impose such a strict 'medical necessity' restriction on states' discretion.") (citations omitted).[3]

Indeed, Respondents themselves have taken completely inconsistent positions on the scope of this allegedly unambiguous requirement to fund abortions. At trial, Respondents advanced the extreme position that *every* abortion is medically necessary. *See* Tr. at 41-42 (testimony of Respondent Hern); *accord* Hern, *Abortion Practice* 46-47 (1984) ("the distinction between elective and therapeutic abortions is false; all abortions are therapeutic.") Before the Court of Appeals, Respondents argued that "The U.S. Congress, by adding rape and incest to the circumstances in which federal funding is available, indicated that the termination of pregnancies resulting from rape or incest are 'medically necessary.' " Brf. of Plaintiff-Appellees at 25-26.

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[3] Thus, this case also presents the subsidiary question of what is "medically necessary," upon which the Circuits have split. *Cf. Hope Medical Group for Women v. Edwards*, 115 S. Ct. 1, 2 (1994) (Scalia, J., in chambers) (finding no conflict in the Circuits in pre-1994 cases).

Before this Court, Respondents take three different positions. First, they rely upon the "directive,"[4] which says that *all* abortions terminating pregnancies resulting from rape or incest are "medically necessary" ("we believe . . . that abortions of pregnancies resulting from rape and incest are medically necessary in light of both medical and psychological health factors.") Opp. at 15. Next, they argue that the availability of federal funding is the touchstone of what is "medically necessary" ("Congress . . . prohibits federal reimbursement for abortions except in the narrow circumstances that Congress deems to be medically necessary.") Opp. at 12. Finally, Respondents retreat to the position that even though federal funds may be available for abortions terminating pregnancies resulting from rape or incest, only a few are medically necessary and must be funded. Opp. at 16 n.10. Respondents' own confusion in this regard simply underscores how *un*clear the supposed requirement is.

Given the serious split of opinion by the Courts of Appeals – with the majority of circuits rejecting the position advanced by Respondents – one cannot say that the language of Title XIX is clear and unambiguous. Indeed, the various and conflicting rationales used by the courts and Respondents to find this purported requirement serves only to underscore that the requirement is not clear and unambiguous.

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[4] Letter from Sally K. Richardson, Director, Medicaid Bureau, Health Care Financing Administration, United States Dep't of Health and Human Services to State Medicaid Directors (Dec. 28, 1993) (Opp. at 1b-3b).

Respondents further attempt to bolster their argument by soliciting "[j]udicial deference to reasonable interpretations by an agency of a statute that it administers . . . . " Opp. at 16 (quoting *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992)). However, Respondents would ask this Court to ignore the Health Care Financing Administration's ("HCFA") formal rules and *only* defer to the so-called "directive," which is nothing more than a letter expressing a federal official's opinion as to the meaning of the law. Because these "directives" are issued without statutory authority and without following any of the procedural requirements of the Administrative Procedures Act, they "are 'spurious rules,' entitled to no weight whatsoever," *Elizabeth Blackwell Health Center for Women v. Knoll*, 61 F.3d 170, 187 (3d Cir. 1995) (Nygaard, J., dissenting).[5]

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[5] *See also South Carolina v. Katzenbach*, 383 U.S. 301, 359 (1966):

> Certainly if all the provisions of our Constitution which limit the power of the Federal Government and reserve other power to the States are to mean anything, they mean at least that the States have power to pass laws and amend their constitutions without first sending their officials hundreds of miles away to beg federal authorities to approve them. Moreover, it seems to me that [a law] which gives federal officials power to veto state laws they do not like is in direct conflict with the clear command of our Constitution that "The United States shall guarantee to every State in this Union a Republican Form of Government."

(Black, J., concurring in part and dissenting in part) (footnote omitted).

In contrast, Respondents urge this Court to accord *no* deference to the interpretation HCFA has, pursuant to the Administrative Procedures Act, explicitly adopted in formal rules. 42 C.F.R. §§ 442.202, .203 and .206. These rules expressly *prohibit* the States from funding the abortions at issue – in direct contradiction of the "directive." And even though it has been more than two years since the change in the Hyde Amendment, HCFA has not amended these regulations, nor evinced any intention to do so. It is difficult to see how any clear and unambiguous requirement could emerge when the federal agency charged with administering the statute persists in contradicting *itself*.

Finally, the HCFA "directive" adopts the position that States must fund all medically necessary procedures falling into any of the "mandatory coverage" categories. Opp. at 2b. As noted above, the Courts of Appeals are split on this view of Title XIX, and the majority of them reject it. In sum, the "directive" is contradicted by formal published rules, was issued without statutory authority, and is based on a legal theory that has been rejected by most federal appellate courts.[6] Indeed, it must be noted

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[6] Respondents continue to insist that the outcome of this case rests upon the Supremacy Clause. Respondents concede, however, as they must, that Colorado's participation in the Medicaid program is voluntary. Opp. at 10. Accordingly, it is beyond dispute that Congress has not intended to preempt the field in this area, and that the Spending Power, not the Supremacy Clause, is at issue. *See Puerto Rico Dep't of Consumer Affairs v. Isla Oil Corp.*, 485 U.S. 495, 503 (1988) (requiring "clear and manifest purpose" of preemption). Thus, Respondents' argument in this regard begs the question that *Pennhurst* and *Dole* require us to ask: has Congress been clear and unambiguous in its intentions?

that a truly "unambiguous" requirement would require much less effort to establish. The contortions that Respondents are forced to undergo show that this supposed requirement is neither clear nor unambiguous.

3. Closely related to the "clear and unambiguous requirement" doctrine are principles of comity and federalism. This Court has recognized that comity represents:

> [A] system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and future.

Younger v. Harris, 401 U.S. 37, 44-45 (1971). To this end, this Court has emphasized the "scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts." *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 111 (1981) (quoting *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932)). *Accord New York v. United States*, 505 U.S. 144, 175 (1992) (States need not appropriate state funds as "a congressionally compelled subsidy.") This is true even though Colorado has voluntarily opted into the Medicaid program, since "the departure from the constitutional plan

cannot be ratified by the 'consent' of state officials." *Id.* at 177.[7]

In the end, the question presented is unquestionably important and Respondents have expressly conceded that this Court has not addressed it. Although Respondents claim that the requirement to fund these abortions is clear and unambiguous, Respondents and the Courts of Appeals cannot agree on where the requirement is found, nor its scope. The federal agency charged with administering the Medicaid program persists in contradicting itself. Notwithstanding this confusion, the court below found a "clear and unambiguous" requirement, and invalidated a popularly adopted state constitutional provision. Review of this case is strongly warranted.

For the foregoing reasons, the petition for a writ of certiorari should be granted. In the alternative, the petition should be held in abeyance pending disposition of the petitions from Arkansas, Nebraska, Louisiana, and Pennsylvania.

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[7] Even though Colorado has chosen to participate in Medicaid in order to access federal funds, it need not do so. Even assuming, *arguendo*, that federal law requires public funding of abortions, in light of *New York v. United States* and principles of comity, the appropriate remedy is *not* invalidation of a state constitutional provision. At most, the court below should have enjoined the State's participation in Medicaid unless and until state law permits it to do so.

Respectfully submitted this 15th day of November, 1995.

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